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No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ANTHONY HERBERT,
Petitioner,

v.

BARRY LANDO, MIKE WALLACE,
COLUMBIA BROADCASTING SYSTEM, INC., and
ATLANTIC MONTHLY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly held that specific defamatory falsehoods that may have been made with actual malice should not be actionable if they are "subsidiary" to "larger" libels that have been found to be nonactionable under that same standard of proof.

2. Whether the First Amendment prohibits a libel action based upon the particular defamatory meanings conveyed by a publication as a whole, as distinguished from specific individual statements contained in the publication.

PARTIES

All parties are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Anthony Herbert, respectfully prays that a writ of certiortari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit entered in this defamation action on January 15, 1986.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported at 781 F.2d 298 (2d Cir. 1986). It is reprinted as Appendix A to this petition at 1a-27a.

Two opinions by the United States District Court for the Southern District of New York issued in this proceed-

ing. The first, in which motions for summary judgment were granted in part and denied in part, was decided on October 10, 1984, and is reported at 596 F. Supp. 1178. It is reprinted as Appendix B to this petition at 28a-132a. The second, in which motions for reargument were denied, was decided on February 27, 1985 and is reported at 603 F. Supp. 983. It appears as Appendix C to this petition at 133a-149a.[1]

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit entering summary judgment against petitioner on all claims was entered on January 15, 1986. This petition for certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. FIRST AMENDMENT, UNITED STATES CONSTITUTION:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

2. FOURTEENTH AMENDMENT, SECTION 1, UNITED STATES CONSTITUTION:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

This is a defamation action brought by Anthony Herbert, petitioner herein, against Columbia Broadcasting System, Inc., producer Barry Lando, and correspondent Mike Wallace (hereafter generally referred to as

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[1] Appendices A, B, C are not found in this petition but in a separately prepared volume that accompanies it captioned "Appendices to Petition for Writ of Certiorari."

"CBS") and the Atlantic Monthly Company, publisher of the *Atlantic* magazine.

The Parties

Petitioner is a retired Army officer. He received widespread media attention following a tour of duty in Vietnam in 1968-69 when he accused his superior officers of covering up war crimes, and of relieving him from his combat command after he had reported such crimes. App. A at 3a-4a. Petitioner is the author of a book, *Soldier*, which recounts his Vietnam experiences and is critical of the Army for its treatment of him there.

Respondents Barry Lando, Mike Wallace, and Columbia Broadcasting System, Inc. ("CBS") jointly worked to produce a television report on petitioner and the veracity his war crime accusations. This report was broadcast by CBS as part of its weekly '60 Minutes" television program on February 4, 1973. Respondent Lando researched the program which was titled "The Selling of Col. Herbert." Respondent Wallace narrated the report, and also participated with Lando in preliminary interviewing and editing. App. A at 4a-5a.

Using information garnered from his participation in the preparation of the CBS broadcast, Lando subsequently wrote a magazine article published by the *Atlantic Monthly* on this same topic. It was titled "The Herbert Affair" and appeared in the May, 1973 issue of the *Atlantic*. App. A at 6a.

Content Of The CBS "60 Minutes" Program And Atlantic Article [2]

The CBS program at issue claimed to be an investigative review of petitioner's attempt to report war crimes and his subsequent treatment by the Army as these facts had become known to the public through the media. The

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[2] For an extensive review of the genesis and contents of the CBS telecast and *Atlantic* article see App. B at 39a-57a.

program included film clips of Herbert's television appearances as well as portions of filmed interviews conducted by both Wallace and Lando. App. A at 5a.

Herbert's superiors in Vietnam were General John Barnes and Colonel J. Ross Franklin. In the course of the CBS presentation, both Barnes and Franklin were shown denying that they ever had received reports from Herbert about war crimes and atrocities. Moreover, individuals cited by Herbert in his book as supporting his claims were also shown denying the accuracy of Herbert's charges. *Id.* Some went even further, stating that Herbert himself could be capable of certain acts of brutality. *Id.* The program *in toto* may be fairly characterized as a defamatory attack upon petitioner's honesty and integrity.

After the CBS "60 Minutes" program was televised, Lando wrote a story about his investigation into petitioner's war crime charges which was sold to the *Atlantic*, a monthly magazine. App. A at 6a. The editors at the *Atlantic* added a preface to Lando's piece which summarized his past involvement with Herbert and the "60 Minutes" broadcast. The Lando article, in general, discussed how Lando had become progressively disillusioned with Herbert as the CBS "60 Minutes" investigation progressed and the "true" facts regarding Herbert's claims were revealed. *Id.* Both the article's overall portrait of petitioner and its conclusions were similarly defamatory to petitioner's reputation.

Litigation History

Petitioner sued for libel on January 25, 1974. He claimed that both the CBS broadcast and the *Atlantic* article contained specific factual inaccuracies that were false, defamatory and made with actual malice. Petitioner also alleged that both publications defamed him when viewed as a whole distinct from any specific statements they may have contained. App. A at 7a; App. B 29a-30a.

Discovery thereafter ensued for a period of approximately one year. However as a result of a dispute over the permissible scope of petitioner's inquiry into CBS' "editorial processes"—a dispute eventually resolved by this Court—discovery was not completed until 1982.[3] At that point in the litigation all defendants moved for summary judgment.

The District Court Decision

The United States District Court for the Southern District of New York granted partial summary judgment for CBS and a complete dismissal of the action against the *Atlantic* magazine on October 10, 1984. App. B at 28a; 121a-123a. Specifically, of eleven discrete statements culled from both the CBS broadcast and the *Atlantic* article that petitioner claimed were actionable, Judge Haight ruled that sufficient evidence of actual malice existed only as to two statements.[4] *Id.* Accordingly he held that a jury trial involving Lando, Wallace and CBS in respect of these statements was required. App. B at 122a.

The first statement deemed actionable was written by Lando for his piece in the *Atlantic.* It reads in its entirety as follows:

> Herbert had also claimed that one of the brigade's top enlisted men, Sergeant Major John Bittorie, had been listening in an outer office when Herbert reported to Colonel Franklin an incident of water tor-

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[3] See *Herbert v. Lando*, 73 F.R.D. 387 (S.D.N.Y. 1977), *rev'd*, 568 F.2d 974 (2nd Cir. 1977), *rev'd and remanded*, 441 U.S. 153 (1979).

[4] A comprehensive listing of each of the eleven statements petitioner asserted were actionable may be found in the Appendix to the Court of Appeals decision, App. A at 25a-27a. Petitioner's claim, asserted both in his complaint and in his brief in opposition to summary judgment, that the specific overall impact of the publications could serve as a separate basis for his defamation action was not considered by Judge Haight until the motions for reargument were heard. App. C at 134a; *infra* at 7-8.

> ture. When the Army CID questioned him, Bittorie denied Herbert's claim. Herbert told me the reason was that although Bittorie himself was retired, he still had two sons in the service and had to worry about their careers. But when I flew to Columbus, Georgia, to interview Bittorie, he again denied having overheard any such report. What about his sons who are in the Army? *He had no sons.* (Emphasis added).

App. B at 90a.

In response to this allegedly false and defamatory statement, petitioner had produced an affidavit executed by Bittorie which recited that he had informed Lando prior to the appearance of this article that he was the father of both a son and daughter and that the son had indeed been in the Army at the time in question. In light of this evidence Judge Haight reasoned:

> . . . it is clear that if the jury accepts Bittorie's account, it could also find upon clear and convincing evidence that Lando published in the *Atlantic Monthly* a false statement, defamatory to Herbert, and with knowledge of falsity. The statement "Bittorie had no sons" is defamatory of Herbert because, in the context in which the statement is made, it accuses Herbert of having lied to Lando.

App. B at 91a.

The second statement challenged by petitioner that Judge Haight ruled actionable was made by Mike Wallace in the CBS "60 Minutes" broadcast. Wallace asserted:

> We have spoken with many men who saw Herbert after his relief in Vietnam. . . to a man they say that Herbert never once said to them that he had been relieved because he had tried to push war crimes charges.

App. B at 101a.

In response to this charge, petitioner had submitted the affidavit of one individual, a helicopter pilot named Kahila, who had been interviewed by Lando prior to the broadcast. Kahila stated that he had in fact told Lando that Herbert had spoken to him on this very subject after his relief. App. B at 103a. Viewing this affidavit as creating a second genuine issue of credibility, Judge Haight ruled the statement actionable:

> If a jury accepts such testimony [from Kahila] and rejects Lando's contentions that either Kahila did not say that or Lando innocently misunderstood him, then a trial jury could find with the requisite degree of certainty that the quoted statement was false, defamatory, and made with actual malice.

App. B at 105a.

In addition to the eleven specific statements taken from both the broadcast and article, petitioner also asserted that a number of specific defamatory meanings were conveyed by the publication as a whole. App. B at 29a-30a. This argument was considered and dismissed by Judge Haight in a separate opinion that was issued on February 27, 1985. App. C at 137a-149a.

Defamations petitioner claimed were generated by both publications as a whole were specified to be that: (1) petitioner had failed to report war crimes while serving with the 173d Brigade; (2) petitioner had made no effort to report war crimes until after My Lai was in the news; (3) during the My Lai publicity, petitioner fabricated the war crimes reason for his relief from command to explain away other reasons for his being relieved; (4) the Army investigation was thorough and found no support for Herbert's charges; (5) petitioner was a brutal man in his treatment of POWs and in condoning brutality against the Vietnamese; (6) petitioner lied about reporting war crimes, his own conduct in Vietnam and his concern about war crimes. App. B at 29a-30a; *see also* App. A at 14a, n.5.

However the district court believed that First Amendment considerations precluded it from considering petitioner's claim that defamation liability could be predicated upon the CBS broadcast report and the *Atlantic* magazine article viewed as a whole, in addition to any specific statements alleged to have been made with actual malice. App. C at 143a-144a. Relying primarily upon a Ninth Circuit opinion, *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), the court held: "There are [First Amendment] policy reasons for requiring specific pleadings in [defamation] cases of this nature." App. C at 143a. For this reason, it rejected petitioner's "overall impact" theory of liability terming it "a less demanding approach [to imposing liability] which constitutional principles reject." App. C at 148a. *See also*, App. C at 147a:

> The media, protected by the First Amendment, and the Court, charged *inter alia* with its enforcement, are entitled to be directed by the public figure plaintiff to specific statements which are defamatory, false . . . and . . . published with actual malice.

The Court of Appeals' Decision

The Court of Appeals affirmed the district court's grant of summary judgment with respect to nine of the eleven asserted defamatory statements. App. A 8a-12a. It further affirmed the lower court's conclusion that the "overall impact" of the CBS broadcast could not be a separately actionable basis for petitioner's suit. App. B at 12a-15a. But although Judge Kaufman, who wrote the opinion for the appeals court, went out of his way to praise the district judge's decision as "thoroughly reasoned," "scholarly" and "meticulous," he could not accept its conclusion that two of the eleven proffered statements were actionable. App. A at 2a; 3a. He therefore reversed the lower court's denial of summary judgment as to these remaining statements thereby effectively dismissing petitioner's entire complaint. App. A at 17a.

In determining whether these two statements were actionable, it is important to emphasize that Judge Kaufman did not reverse or even contest the district court's finding that state of mind issues of credibility were raised by each statement that would normally be resolved by the jury. He simply noted and ignored it. App. A at 18a; 19a. The fact that petitioner was both ready and able to proffer testimony to a jury from which it could find that these two statements were false, defamatory and made with actual malice was irrelevant to Judge Kaufman's disposition of these claims. The reason for this was the novel constitutional privilege he outlined for rendering otherwise actionable statements nonactionable: his "subsidiary libel" doctrine.[5]

The Subsidiary Libel Doctrine

Judge Kaufman's articulation of his subsidiary libel doctrine proceeded in two stages. He began by focusing on the nine statements dismissed by Judge Haight as nonactionable because there was insufficient evidence to prove that they had been made actual malice. App. A at 21a. Because Herbert could not prove to the court's satisfaction that these statements had been made with actual malice—although he vigorously maintained throughout the course of this litigation that they were actionable under this standard—and in light of other evidence tending to suggest that CBS had in fact believed in the veracity of these statements, Judge Kaufman asserted that CBS, Lando and Wallace:

> could not be said to have actual malice in publishing their view that (1) Herbert lied about reporting war crimes to his superiors in Vietnam, and (2) Herbert's relief from command must therefore have been for other reasons [than those alleged].

App. A at 21a.

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[5] That this doctrine is truly "novel" is attested to by the fact that *no* cases from this or any other court were cited by Judge Kaufman to support its creation. App. A at 21a-24a.

Having demonstrated that "these larger views," App. A at 22a, were nonactionable, Judge Kaufman next asked whether it was proper to allow Herbert to base his defamation action solely on inaccuracies that he characterized as being "subsidiary" to them, i.e., the two statements Judge Haight had found to be actionable. App. A at 22a. He concluded that it was not.

Thus, for example, although Judge Kaufman recognized that the statement "Bittorie had no sons," "strengthened Lando's portrayal of Herbert as a man who lied about reporting war crimes," *id.*, he stated that this was "merely a subsidiary matter to the primary, nonactionable issue—whether Herbert lied about reporting war crimes." *Id.* Because Herbert could not establish with convincing clarity that the latter, "larger" statement had been made with actual malice, the former, "subsidiary" statement was deemed nonactionable. *Id.*

The second statement Judge Haight stated was actionable—Wallace's assertion that "to a man," those who spoke with CBS said that Herbert had never been relieved for reporting war crimes—was similarly dealt with. Although Judge Kaufman recognized the clear defamatory impact of the statement and the possibility that petitioner might conceivably demonstrate to a jury that it had been broadcast with actual malice, he opined that:

> The only potentially defamatory inference that could be drawn from Wallace's statement is that Herbert was relieved of command for reasons other than reporting war crimes. But we have already held this [larger statement] to be nonactionable.

App. A at 22a-23a.[6]

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[6] To reiterate, these "larger" statements were deemed nonactionable not because petitioner conceded their accuracy, which he never did, but because he was incapable in the court's eyes of proving with convincing clarity that they had been published with actual malice.

Succinctly stated, Judge Kaufman defined his unprecedented subsidiary libel doctrine as follows:

> [W]e hold . . . that [some] statements—*even those that might be found to have been made with actual malice*—should not be actionable if they merely imply the same view and are simply an outgrowth of and subsidiary to those [defamation] claims upon which it has been held there can be no recovery.

App. A at 23a (emphasis added). No guidance was offered as to how federal judges were henceforth to distinguish "primary" from "subsidiary" statements of fact and no apparent limits were placed upon the right of the press to disseminate "subsidiary" falsehoods with actual malice.

Perhaps unsurprisingly, after setting forth this unbridled constitutional privilege Judge Kaufman immediately felt it necessary to assert that he was *not* giving defamation defendants a license "to freely embellish their stories with falsehoods while remaining free from liability." *Id.*

REASONS FOR GRANTING THE WRIT

1. The Second Circuit has promulgated the novel constitutional rule that a defamatory factual statement should not be actionable if it is merely "subsidiary" to a "larger" falsehood which is incapable of disproof. In so holding, the Court of Appeals expressly declared that it is completely irrelevant for purposes of this rule whether or not a jury might find the "subsidiary" lie to have been published with actual malice. The Court of Appeals "subsidiary libel" doctrine would therefore grant an absolute immunity to knowing or reckless lies. For this reason it stands in direct and open conflict with past libel decisions of this Court admitting of no exception to the requirement that *all* defamatory falsehoods made with constitutional malice are actionable. Allowing libel defendants to escape even the most minimal liability for pub-

lishing calculated, albeit "subsidiary," lies furthers no significant First Amendment values. Moreover it is impossible to envision how federal judges are to define, let alone restrict, the constitutional parameters of a "subsidiary" libel with any sort of certainty or predictability.

2. The particular defamatory meaning conveyed by the overall import of a publication should constitute a separate actionable basis for defamation liability in addition to any particular defamatory statements appearing therein. Although this Court has yet to address this regularly recurring federal issue, the courts below dismissed petitioner's overall impact claim on the grounds, *inter alia*, that the First Amendment precludes anything other than specific statements in a publication from being actionable in a libel suit. This overly expansive reading of the First Amendment's protections not only conflicts with the holdings of other federal courts but also unreasonably constricts the legitimate reputational interests of all libel plaintiffs.

3. Petitioner's case was dismissed on defendants' motions for summary judgment where all of his asserted claims were evaluated under the purported constitutional standard of whether a reasonable jury could find the existence of actual malice "with convincing clarity." However, whether the clear and convincing evidence standard is indeed required at the summary judgment stage will only be decided later this term in the *Liberty Lobby v. Anderson* case. Because the decision that issues in the *Liberty Lobby* case will affect petitioner's substantive rights, certiorari should be granted and this case should be held over until such time as the *Liberty Lobby* case is decided.

ARGUMENT

I. THE SECOND CIRCUIT'S NOVEL SUBSIDIARY LIBEL DOCTRINE DIRECTLY CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT ADMITTING OF NO EXCEPTION TO THE RULE THAT ALL DEFAMATORY STATEMENTS MADE WITH ACTUAL MALICE ARE ACTIONABLE.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964) this Court undertook the first step to implement an entirely new system of defamation liability. Under the federal rule announced in that case, one sued for libel by a public official could no longer be punished if he had merely published a defamatory falsehood causing damage to reputation. Instead, liability was premised upon a finding of "constitutional malice" defined as publishing knowing falsehoods or in reckless disregard for the truth of the challenged statements. 376 U.S. at 280.

Viewed a different way, this Court struck a balance in the *Sullivan* case between the public's need to discuss public affairs in an uninhibited manner and the competing interest of defamed public officials in vindicating their reputations. Although the constitutional "actual malice" privilege to defame a public official was deliberately made difficult, it was designed to be conditional and not absolute in scope.[7]

The last two decades have witnessed a substantial expansion, modification and more detailed exposition of the federal libel scheme established in *Sullivan*. Yet one principle has remained constant throughout: regardless of the context in which they appear, defamatory falsehoods made with actual malice are actionable. Justice Bren-

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[7] In holding that defamatory falsehoods made with actual malice, i.e., calculated lies, should continue to remain actionable, this Court expressly declined to adopt the view of three Justices, Black, Douglas and Goldberg, who urged the adoption of an absolute privilege to defame public officials. 376 U.S. at 293-303.

nan explained the policy reasons for placing such a limitation on speech of this nature early in the Court's development of this rule:

> Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public figure, should enjoy a like immunity. . . . Calculated falsehood falls into that class of utterances which are "no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." Hence, the knowing false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (citation omitted).

Thus, when this Court broadened the scope of the constitutional privilege to encompass "public figures" and even, for a short while, "issues of general or public concern," it always maintained that knowing or reckless falsehoods must remain actionable. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Indeed, this Court's commitment to the rule that defamatory statements made with actual malice are afforded no immunity under the First Amendment is such that it has recently and unanimously held that even in the context of a petition to the government there is not an absolute privilege to defame. *McDonald v. Smith*, —— U.S. ——, 105 S. Ct. 2787, 2791 (1985). ("The right to petition is guaranteed; the right to commit libel with impunity is not.") *Cf. also, Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (even the weighty federal policies favoring uninhibited debate in labor disputes do not give either union or management the right to intentionally or recklessly circulate defamatory material known to be false.)

In sum, the rule that calculated or reckless lies must always remain actionable stands at the very core of *Sullivan* and its progeny. Such statements, being false, not only have "no constitutional value," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), but they actively undermine "the premises of democratic government." *Garrison*, 379 U.S. at 75.[8] Yet it is precisely this basic requirement that the Court of Appeals has seen fit to ignore. In place of the scrupulous balance of competing constitutional concerns that this Court has established—a balance which has always rendered knowing or reckless lies actionable—the Second Circuit has embarked upon a new doctrinal theory that would allow the press to disseminate defamatory falsehoods about public figure *with actual malice* and yet completely escape all liability. The mechanism of escape is its newly invented "subsidiary libel" doctrine.

As described by Judge Kaufman, the subsidiary libel doctrine would bar a libel plaintiff[9] from maintaining a cause of action whenever falsehoods are published about him that are an outgrowth of "larger" untruths that are incapable of disproof given the applicable standard of lia-

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[8] Moreover, even in the context of a public figure libel action there is the countervailing consideration that a valuable, even if reduced, reputational interest is at stake:

> The individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."

Gertz, 418 U.S. at 341, *quoting Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). *See also, St. Amant v. Thompson*, 390 U.S. 727, 734 (1968) (Fortas, J., dissenting). (Although "[t]he public official should be subject to severe scrutiny and to free and open criticism," if defamed with actual malice "he should have a remedy in law.")

[9] Although petitioner is a public figure, Judge Kaufman's sweeping doctrine could just as easily be employed in the context of a private figure libel plaintiff facing a negligence standard.

bility. This is so even if these "subsidiary" lies, in Judge Kaufman's own words, "might be found [by a jury] to have been published with actual malice." App. A at 23a. But the Court of Appeals' novel constitutional doctrine proves to be too much. It explicitly affords the ultimate in constitutional protection—an absolute privilege—to speech that is of no constitutional value whatsoever: the calculated lie.[10] This is such a direct and flagrant disregard of the decisional law of this Court as almost to warrant summary reversal.

But even if the subsidiary libel doctrine announced below could, through fast expository footwork, be somehow reconciled with the relevant case law (a daunting feat not even attempted by Judge Kaufman who cites *no* precedent to support his rationale) there is simply nothing to be said for allowing such a dangerous theory to go unreviewed and unchallenged.[11]

One may begin by noting the definitional ambiguities inherent in the very notion of a "subsidiary" libel. Judge Kaufman provides no clear guidelines for separating out actionable, but "non-subsidiary" statements from "larger" nonactionable statements. And, in truth, it appears as though no precise or predictable test is possible since it would turn upon an inherently subjective evaluation of the interrelatedness of one fact to another.[12]

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[10] In *Dun & Bradstreet v. Greenmoss Builders*, —— U.S. ——, 105 S. Ct. 2939 (1985) this Court reasserted the notion that there is a hierarchy to various types of speech and that the amount of constitutional protection afforded speech varies according to how directly the speech at issue bears upon "matters of public concern." In this sense, speech made with actual malice has a negative constitutional value. *Id.*, 105 S. Ct. at 2951 (White, J., concurring).

[11] This is particularly so in light of the high proportion of libel actions brought in the Second Circuit against publishers having as their principal place of business New York City.

[12] Federal courts have repeatedly demonstrated the inherent difficulties of distinguishing protected opinion from actionable fact.

Secondly, Judge Kaufman offers no cogent rationale to explain why a discrete defamatory falsehood made with actual malice should be deemed nonactionable simply because it is an outgrowth of a larger nonactionable defamation. Suppose, for example, that a newspaper were to publish an editorial stating that based upon its overall impressions of a certain judge's conduct over the past year it believed that judge to be a racist. Then suppose the editorial offered a specific factual example to support its view. In a very real sense the specific example of allegedly racist conduct may be viewed as an outgrowth of the larger protected opinion based upon the paper's overall monitoring of the judge's performance. But if that statement of fact is false and the judge sues, why should it not be actionable if proof of actual malice is available? In short, the legal alchemy Judge Kaufman employs to transmute an otherwise actionable fact into a nonactionable "subsidiary" fact is incapable of reasoned explanation.

More to the point, so-called "subsidiary" libels have repeatedly been held to be actionable by other federal courts. For example, in *Westmoreland v. CBS*, 596 F. Supp. 1170 (S.D.N.Y. 1984) the district court conceded that there was a great deal of evidence to support the defendants' overall belief that General Westmoreland had led a conspiracy to suppress intelligence about the size of the enemy force in Vietnam. Despite the fact that this "large" view was arguably nonactionable, the court held that specific subsidiary statements in the CBS program at issue in that case were actionable and required a trial:

See e.g., Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2662 (1985). Yet there is a compelling interest for undertaking such an arduous task, *viz.*, "[u]nder the First Amendment there is no such thing as a false idea." *Gertz*, 418 U.S. at 339. Here, by contrast, we are dealing with the ambiguous concept of "primary" and "subsidiary" *facts*, not opinions. Accordingly, there is no similarly compelling reason for judges to make such subjective determinations.

> Although a reporter may have sufficient evidence of his charge to foreclose any material issue of constitutional malice for its publication, he may nonetheless make himself liable if he knowingly or recklessly misstates th[e] ["subsidiary"] evidence to make it seem more convincing or condemnatory than it is.

Id. at 1174. Assuming *arguendo* Judge Kaufman is correct and that in the instant proceeding the "primary" libels uttered by CBS are nonactionable, petitioner is still entitled to go to trial if, as the district court found, there is evidence to show "actual malice" in CBS' presentation of specific factual charges that injured his reputation.

Lastly, it hardly needs emphasizing how the subsidiary libel doctrine could be used to sanction malicious character assassination so long as a defendant was always careful to include a variety of "larger" unprovable lies in his attack. The very likelihood that such will occur is undoubtedly what led Judge Kaufman to warn that he did not intend "to permit defamation defendants to freely embellish their stories with falsehoods while remaining free from liability." App. A at 23a.

In sum, Judge Kaufman's doctrine is an open challenge to the principle of *stare decisis*. It would be unworkable in practice and would result in the dismissal of meritorious libel suits such as petitioner's. For all these reasons the Court should grant this petition to review the novel and dangerous doctrine promulgated below.

II. THE DECISION BELOW PRESENTS AN IMPORTANT AND UNSETTLED QUESTION OF CONSTITUTIONAL LAW AS TO WHETHER THE PARTICULAR DEFAMATORY MEANINGS CONVEYED BY A PUBLICATION AS A WHOLE MAY BE ACTIONABLE.

This case also presents a second important federal question for review: whether the "overall impact" of a publication may constitute a separate actionable basis for

a defamation suit where particular defamatory meanings are conveyed by the publication viewed as a whole. Several federal appeals courts have adopted this position. *Infra* at 20-21. However when this claim was asserted below both courts unequivocally rejected it. App. A at 12a-15a; App. C at 146a-148a. Although this Court appears to have accepted the notion that an invasion of privacy action may be based upon the specific false impressions conveyed by a publication examined as a whole, *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), it has yet to make a similar ruling in the libel field. Review is therefore sought to resolve this issue.

In particular, petitioner asks this Court to reconsider the district's holding that the First Amendment in some way precludes a libel action premised upon the specific libels generated by a media program or article when viewed as a whole as distinct from separate specific statements therein that are also alleged to be defamatory.[13] App. C at 143a-145a.

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[13] While the Court of Appeals affirmed the district court's dismissal of petitioner's overall impact claim, it avoided doing so on constitutional grounds. App. A at 13a-14a. Instead it asserted that allowance of this action would be "a meaningless gesture," since, in the appellate court's opinion, "the defamatory implications of the specific statements [deemed nonactionable] and the overall impact of the publications are identical." *Id.* at 14a-15a. But this distinction misses the point. Even assuming, which petitioner does not, that the evidence he has proffered as to each of the eleven specific statements in the CBS broadcast and *Atlantic* article is insufficient, viewed in isolation, to support a finding of actual malice, petitioner is claiming that the *cumulation* of all this evidence proves actual malice as to specific charges derived from the publication as a whole. In other words, petitioner claims that he doesn't need one piece of evidence which *by itself* proves actual malice as to one particular statement. Rather, the evidence can be cumulated and offered to show that publication as a whole made specific disparaging remarks that are actionable.

Moreover it is curious, to say the least, that Judge Kaufman's analysis would make both subsidiary lies nonactionable where the

The rationale articulated by the lower court to support its decision is twofold. It rests upon the fact that (1) the media enjoy "presumptive First Amendment protection" to discuss the conduct of public figures; and (2) that this protection would be reduced unless specific allegations were pleaded by a libel plaintiff. *See* App. C at 143a, *citing*, *Small v. ABC*, 10 Med. L. Rptr. 2391, 2392 (N.D. Iowa 1984); *Barger v. Playboy Enterprises, Inc.*, 564 F. Supp. 1151, 1154 (N.D. Cal. 1983) and *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076, 1082-83 (9th Cir. 1976).

In fact, however, there is nothing in the decisional law of this Court that precludes a plaintiff from basing a libel action on the overall specific impact of a publication. This is particularly so if the publication, considered in its entirety, is understood by its intended audience to impugn the plaintiff's character in several specific ways.

Thus, for example, in the analogous area of false light invasion of privacy this Court, in a nearly unanimous decision allowed a jury verdict of liability against a newspaper to stand primarily because it had published an article conveying the specific misimpression that a personal interview with one of the article's subjects had occurred. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974).

Moreover, several lower courts of appeals have allowed defamation actions to be predicated upon the overall thrust of a publication. For example, in *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978), the plaintiff contended that the specific inference which flowed from a television broadcast was actionable "even if no single remark in it

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larger, primary lies are nonactionable, *supra* at 13-18, and the larger, primary lies nonactionable where the subsidiary lies are nonactionable.

was defamatory," 576 F.2d at 497, and the Third Circuit fully considered and evaluated the claimed defamatory impression created by the program as a whole. *Id.* at 501-504. Similarly, in *Lauderback v. American Broadcasting Companies, Inc.*, 741 F.2d 193 (8th Cir.), *cert. denied*, 105 S. Ct. 961 (1984), the court considered a libel plaintiff's contention that the "broadcast, on the whole, characterized him as a crook and a liar." 741 F.2d at 195. *See also Locricchio v. Evening News Association, Inc.*, No. 64729, slip op. at 2 (Mich. Ct. App. Aug. 24, 1983), *cert. denied*, 105 S. Ct. 433 (1984) (a plaintiff need not base his libel action upon specific statements; "publication considered as a whole" may be actionable); *Janklow v. Newsweek*, 759 F.2d 644, 651 (8th Cir. 1985) (specific defamatory meaning drawn from magazine article, viewed as a whole, is actionable).

Finally, in *Hoffman v. Washington Post Co.*, 403 F. Supp. 600 (D.C. 1977), *aff'd w.o. opinion*, 578 F.2d 442 (D.C. Cir. 1978), a federal court, faced with a claim similar to that asserted herein, stated:

> . . . The Court need not determine whether these two statements, standing by themselves, are defamatory. They were not published standing by themselves. They were published in context. The court's function is to determine whether the publication *taken as a whole* is defamatory, not whether two isolated statements might not be defamatory if published by themselves. . . . The challenged publication must be read as a whole. Its content must be considered in its entirety and weighed in connection with its structure, nuances, implications, and connotations. (Emphasis added).

Id. at 602 n.1.

Thus it is abundantly apparent that the claim asserted by petitioner has merit and should not have been dismissed out of hand. Yet the question remains unsettled. If the lower court and respondents are correct that the

First Amendment precludes libel plaintiffs from basing a cause of action upon the overall impact of a publication a radical constriction of the legitimate rights of all libel plaintiffs will have occurred. Defamations previously treated as a proper basis for a libel action will have become absolutely privileged. This Court should therefore grant certiorari so that this important, but unsettled, issue of constitutional law may finally be resolved.

III. BECAUSE PROPER DISPOSITION OF PETITIONER'S CLAIMS DEPENDS, IN PART, UPON THIS COURT'S FORTHCOMING HOLDING IN *LIBERTY LOBBY v. ANDERSON*, THIS PETITION SHOULD BE HELD OVER UNTIL SUCH TIME AS THAT DECISION ISSUES.

Last term, this Court granted certiorari in *Liberty Lobby v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1983), *cert. granted*, —— U.S. ——, 105 S. Ct. 2672 (1985) (No. 84-1602). The question presented for review in that case is whether in order to deny a defendant's motion for summary judgment in a public figure libel action, the trial court judge must conclude as a matter of federal law that a reasonable jury not only could find the existence of actual malice, but could find that it had been established with "convincing clarity."

The "convincing clarity" standard at issue in *Liberty Lobby* was used by the district court judge below to weigh the sufficiency of petitioner's proof of actual malice for each of the eleven separate statements claimed to be actionable. App. B at 38a; App. C at 142a ("A reading of the Court's prior opinion makes it plain that the main focus was upon whether or not a jury could find . . . actual malice by that measurably heavier burden of 'clear and convincing evidence.' "). This occurred despite petitioner's strenuous objections to its use. *See* Brief of Appellant-Appellee Anthony Herbert in the U.S. Court of Appeals for the Second Circuit beginning

at 47. Further, it cannot be gainsaid that of the nine statements found by the district court to be nonactionable, one or more would have been allowed to go to trial had the judge not employed the convincing clarity standard at this preliminary phase of the proceeding.

For example, petitioner challenged one statement by respondent CBS to the effect that "none" of the men serving under him knew for certain that he had reported war crimes. App. B at 65a. Petitioner claimed that CBS in fact had information to the contrary prior to the broadcast. App. B at 67a. After carefully examining the charges and countercharges with respect to two individuals who had spoken to CBS and had at one time supported petitioner's claim, App. B at 67a-83a, Judge Haight concluded that because there were "elements of ambiguity and uncertainty" in their testimony, "a reasonable jury could not find *with convincing clarity* that [CBS] acted with actual malice. . . ." App. B at 83a (emphasis added). Thus, application of the "convincing clarity" standard appears decisive on this statement and others that were dismissed as well. *See e.g.*, App. B at 100a-101a ("In the case at bar, assuming *arguendo* that a trial jury accepted Herbert's denials . . . the jury could not find *by clear and convincing evidence* that the CBS defendants proceeded recklessly in publishing that account.") (emphasis added).

The district court's use of the clear and convincing standard was affirmed by the Court of Appeals. App. A at 8a. This occurred despite petitioner's renewed objections to its use and the appellate court's awareness of the pending *Liberty Lobby* case. App. A at 8a, n.2.

In short, both the trial and appellate courts believed that all of the evidence of actual malice adduced by petitioner below had to be assessed according to the constitutional "convincing clarity" standard. But this "requirement," at least insofar as it relates to the summary judgment phase of a public figure libel trial, is dubious. If

this Court were to rule in the *Liberty Lobby* case that no such requirement exists, petitioner would be entitled to have this case remanded and his claims reassessed.

This court's disposition of the *Liberty Lobby* case may affect the fair consideration of petitioner's claims in a second and less obvious way. The present procedural posture of the *Liberty Lobby* case is quite similar to that of the instant proceeding. In *Liberty Lobby*, the District of Columbia Circuit would have allowed twenty-one of thirty alleged libels to survive a motion for summary judgment and proceed to trial. Similarly the dispute in this case swirls, in part, around two of eleven alleged libels that the district court would have sent to trial. Moreover in *Liberty Lobby*, as here, the actionable statements may be viewed as "subsidiary" to "larger" libels that were incapable of disproof. This Court's decision in *Liberty Lobby* may therefore touch upon some of the issues raised herein. This likelihood is increased considering the fact that the subsidiary libel doctrine formulated by Judge Kaufman was at one point referred to as "a variation of the 'libel-proof' [plaintiff] doctrine,' " App. A at 21a, n.10, and the *Liberty Lobby* case indirectly involves that doctrine. *See Liberty Lobby v. Anderson*, 746 F.2d 1563, 1568-69.[14]

Thus, because of the substantial impact this Court's decision in the *Liberty Lobby* case is likely to have on petitioner's claims, petitioner respectfully requests that, at the least, certiorari be granted and this petition be held over until such time as a decision in that case issues. Further, if the Court rules that the clear and convincing standard is inapplicable at the summary judgment stage of a public

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[14] The defendants in *Liberty Lobby* requested this Court to review Judge Scalia's holding on the libel-proof issue in their certiorari petition, but the Court declined. This does not foreclose the possibility, however, that it may nevertheless be discussed in dicta when the Court's decision issues.

figure libel action, this Court should then order an appropriate remand.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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April 15, 1986

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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANTHONY HERBERT,
Petitioner,

v.

BARRY LANDO, MIKE WALLACE,
COLUMBIA BROADCASTING SYSTEM, INC., and
ATLANTIC MONTHLY COMPANY,
Respondents.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 569, 570, Docket 85-7014, 85-7466

ANTHONY HERBERT,
Plaintiff-Appellant-Cross-Appellee,

v.

BARRY LANDO, MIKE WALLACE,
COLUMBIA BROADCASTING SYSTEM, INC.,
Defendants-Appellees-Cross-Appellants,

ATLANTIC MONTHLY COMPANY,
Defendant-Appellee.

Argued Dec. 12, 1985

Decided Jan. 15, 1986

Before KAUFMAN, TIMBERS and NEWMAN, Circuit Judges.

IRVING R. KAUFMAN, Circuit Judge:

The First Amendment embodies one of our nation's strongest ideals, but in practice the principle itself has been subject to constant, unyielding attack. In media defamation law, there have been relentless demands for redress when the media appears to have exceeded the

bounds of propriety. So it is that our courts, sensing that shackles on the press might be more easily imposed than lifted, have repeatedly refused demands that they restrict the scope of the First Amendment guarantees of free speech and a free press.

The Supreme Court recognized this principle and gave it the force of law in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). This frequently cited case established the principle that a public official could not successfully sue a publisher for defamation unless it was published with "actual malice" —that is, knowing falsity or reckless disregard for truth or falsity. Later decisions emphasized that the rights of a free press, "while lodged in the reporter and his publisher, in reality reflect an underlying interest of the public," *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595 n.12 (1st Cir. 1980), and acknowledged that "the First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974).

I. BACKGROUND

With these principles in mind, we confront for the second time in a decade this defamation action brought by Colonel Anthony Herbert against Columbia Broadcasting Systems ("CBS"), producer Barry Lando, correspondent Mike Wallace, and the *Atlantic Monthly*. The prolonged and bitterly contested proceedings have come to a temporary halt upon the granting of partial summary judgment for the defendants and a complete dismissal of the action against the *Atlantic Monthly*, in a thoroughly reasoned and scholarly opinion by Judge Haight. Herbert appeals the dismissal and the granting of partial summary judgment. Lando, Wallace and CBS cross-appeal the denial of summary judgment on two alleged false and malicious statements.

The underlying facts of this case have been thoroughly explored by the courts on several previous occasions. *See Herbert v. Lando*, 568 F.2d 974 (2d Cir. 1977), *rev'd*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979); *Herbert v. Lando*, 596 F.Supp. 1178 (S.D.N.Y. 1984); *Herbert v. Lando*, 73 F.R.D. 387 (S.D.N.Y. 1977). Because our evaluation of the propriety of the district court's actions depends heavily on the facts, however, we once again recite the necessary, but briefer, history of the case and its procedural background. We are fortunate in having Judge Haight's meticulous exegesis of this litigation already set forth in his fine opinion, thus avoiding the need for a detailed explication of the facts.

This action was brought by Anthony Herbert, a retired Army officer who charged that he was relieved of command in Vietnam because he reported to his superiors war crimes and atrocities committed under the supervision of U.S. military personnel. Herbert, a highly decorated soldier who also had served in Korea, was on duty in Vietnam from September, 1968 to July, 1969. Between February 6 and April 4, 1969, Herbert commanded the 2d battalion of the 173rd Airborne Brigade. His superiors were General John Barnes, commander of the brigade, and Colonel J. Ross Franklin, deputy commander of the brigade.

On April 4, 1969, Barnes relieved Herbert of his command of the 2d battalion and reassigned him to the Capital Military Assistance Command in Saigon. Herbert protested his relief from command, claiming it was without justification. In Saigon, he initiated a proceeding pursuant to Article 138 of the Uniform Code of Military Justice, 10 U.S.C. § 938, but was denied redress by a military board. Soon thereafter, Herbert was transferred back to the United States. On September 28, 1969—seventeen months after his relief from command—he filed formal charges with the Fort McPherson Inspector General's Office. Herbert alleged the 173rd Airborne Brigade

had committed war crimes and atrocities, but that when he reported the war crimes to Barnes and Franklin, they failed to investigate the incidents. Herbert also claimed Barnes then relieved him of command because he had made the charges. The Army's Criminal Investigation Department launched three investigations into Herbert's allegations, but eventually exonerated Barnes and Franklin of all charges.

After Herbert retired from the Army, the urge to write about his experiences prompted him to produce a book titled *Soldier*. New York Times reporter James Wooten collaborated. The book recounted Herbert's experiences in the military, including his attempt to report war crimes and his subsequent treatment by the Army. In the wake of the My Lai trials, media attention quickly focused on Herbert, who continued to press his accusations against the Army while publicizing his book on radio and television programs. Among his numerous appearances was one on the "The Dick Cavett Show," whose viewing audience generally was considered to be highly intelligent.

During the Army investigation of Herbert's charges, Barry Lando, then a writer for CBS, interviewed Herbert. He was impressed by Herbert's story and believed in his sincerity. Indeed, CBS broadcast a portion of the interview on its Weekend News program. Moreover, after the Army had cleared Barnes and Franklin of Herbert's charges, Lando continued to interview Herbert and in his new position as a producer for "60 Minutes," suggested to CBS correspondent Mike Wallace that "60 Minutes" offer a favorable presentation on Herbert and his charges. Wallace, who was skeptical about some of Herbert's claims, told Lando he was reluctant to present Herbert's story. Instead, he suggested that Lando seek additional information.

Lando's subsequent investigation entailed interviews with more than 120 people and the examination of

thousands of documents. For the most part, the Army cooperated with Lando's inquiries, but it refused to release its files on the investigations of Barnes and Franklin that had been prompted by Herbert's charges. Lando's further investigation, however, and his frequent conferences with Wallace, eventually convinced Lando that the Army had not relieved Herbert of command in Vietnam because of his purported attempt to report war crimes.

Based on Lando's disbelief in Herbert's story, Wallace agreed to broadcast a segment on "60 Minutes" casting doubt on the validity of Herbert's charges. The program was aired on February 4, 1973. Following the format of the "60 Minutes" presentation, "The Selling of Col. Herbert" was one of three segments broadcast that evening. In his introduction, Mike Wallace reviewed Herbert's charges as they had become known to the public through the media and Herbert's book *Soldier*. He then stated: " '60 Minutes' set out to investigate the validity of Herbert's allegations. . . . Here is our report." The program included film clips of Herbert's appearance on the "Dick Cavett Show," as well as portions of filmed interviews conducted by Wallace or Lando. In the course of the presentation, both Barnes and Franklin denied ever having received reports from Herbert about war crimes and atrocities. Moreover, individuals cited by Herbert in his book as supporting his story denied the accuracy of Herbert's charges. Some went even further, stating that Herbert himself could be capable of certain acts of brutality. Wallace concluded the program with this comment: "The Army could indeed help to resolve the controversy. They could open their files to a public airing. They could make themselves available for questioning about the whole Herbert business. But they won't. . . . Perhaps the best way to stop all speculation is to do what you heard Anthony Herbert and General Barnes suggest a moment ago: make the Army investigations public."

After the "60 Minutes" program was televised, Lando wrote about his investigation into Herbert's charges. He sold the article to the *Atlantic Monthly*. The editors added a preface, or "streamer," which summarized Lando's involvement with the Herbert case leading to the "60 Minutes" broadcast. In addition, the editors collaborated with Lando in creating a conclusion that was critical not only of Herbert, but also of the press for accepting Herbert's charges against the Army at face value. The last two lines read: "The press, which long had been negligent about dealing with the question of American war crimes, found in Herbert a heroic figure, a martyr through whom to dramatize the issue. But we bought ourselves a martyr with feet of clay." Illustrating the article were design graphics of five silhouettes of a soldier, appearing as targets on a firing range. As the article progressed, the silhouettes became increasingly riddled with bullet holes. The article was published in the May, 1973 issue of *Atlantic Monthly* under the title, "The Herbert Affair."

On January 25, 1974, Herbert filed an action for defamation against CBS, Lando, Wallace and the *Atlantic Monthly*. The defendants cooperated in the discovery proceedings for over one year, but finally objected to answering questions concerning the "editorial processes" involved in producing the broadcast and the article. Specifically, Herbert had sought information regarding Lando's state of mind while he was researching Herbert's claims, conversations that took place between Lando and Wallace, and reasons behind Lando's decisions ultimately to include or exclude certain materials.

Judge Haight ruled Herbert had a right to discovery in these areas. 73 F.R.D. 387 (S.D.N.Y.1977). This Court reversed on the ground that editorial processes were protected by the First Amendment. 568 F.2d 974 (2d Cir.1977). The Supreme Court reversed, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), and discovery continued. In late September, 1982, when discovery was com-

plete, all defendants moved for summary judgment. In his memorandum filed in opposition to summary judgment, Herbert specified eleven statements appearing either in the broadcast or the article which he claimed were made with "actual malice" as defined in *New York Times v. Sullivan, supra.* On October 10, 1984, Judge Haight granted summary judgment for *Atlantic Monthly* and partial summary judgment for the remaining defendants with respect to nine of the eleven specific statements, finding there was no evidence that these statements were made with actual malice; he also denied summary judgment with respect to two other statements. 596 F.Supp. 1178. Entry of judgment dismissing the suit against *Atlantic Monthly* was ordered pursuant to Fed.R.Civ.P. 54(b).

Herbert moved for reargument, citing four additional statements he claimed were actionable, and protesting Judge Haight's refusal to consider the "overall import" of the publications as a basis for the defamation action. The district court denied the motion. 603 F.Supp. 983. On March 25, 1985, the remaining defendants--CBS, Lando, and Wallace—moved for dismissal of the two statements the court had deemed actionable. They claimed these statements could not possibly harm Herbert's reputation beyond the damage already done by the "nonactionable" statements. The district court denied this motion, and certified for appeal pursuant to 28 U.S.C. § 1292(b) the ruling granting partial summary judgment to defendants CBS, Lando and Wallace as to nine statements and denying summary judgment to these defendants as to the two remaining statements, the ruling denying plaintiff reargument, and the ruling denying defendants' renewed effort to dismiss the two remaining statements. We granted leave to appeal the issues raised below by orders dated June 6 and June 26, 1985.

II. DISCUSSION

A. *The Nine Nonactionable Statements*

We begin our discussion by reviewing the nine specific statements that Judge Haight found lacked any evidence of actual malice. (Appendix)[1] Following a painstaking analysis of the eleven statements specified by Herbert in his memorandum opposing summary judgment, Judge Haight held that in nine of the statements, Herbert had failed to produce sufficient evidence for a jury to find with convincing clarity that the statements were published with actual malice.

At the outset, we note that the "convincing clarity" standard for granting or denying summary judgment in defamation actions continues to be the law of this Circuit. *Yiamouyiannis v. Consumers Union*, 619 F.2d 932, 940 (2d Cir.1980) ("a judge in denying a defendant's summary judgment motion must conclude that, based on the evidence asserted in the plaintiff's affidavits, 'a reasonable jury *could find* actual malice with convincing clarity'," *quoting Nader v. deToledano*, 408 A.2d 31, 50 (D.C.App. 1979), *cert. denied*, 444 U.S. 1078, 100 S.Ct. 1028, 62 L.Ed2d 761 (1980)) (emphasis in original).[2] Since

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[1] Herbert has conceded that he is a "limited purpose public figure" within the meaning of *New York Times v. Sullivan, supra,* and therefore he is required to show the defendants exercised "actual malice" in publishing the allegedly defamatory material. 596 F.Supp. at 1168. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 136 (2d Cir. 1984).

We do not consider here the four additional statements raised by Herbert for the first time in his motion for reargument. They were untimely pursuant to the district court's Civil Rule 3j (permitting the moving party to submit only those issues it believes the court overlooked).

[2] We acknowledge the District of Columbia Circuit reached a different conclusion concerning the proper standard for summary judgment in defamation actions in *Liberty Lobby v. Anderson,*

discovery in this case is complete, we see no reason to depart from the standard set forth in *New York Times v. Sullivan, supra,* 876 U.S. at 285-86, 84 S.Ct. at 728-29 (jury verdict of liability reversed because "the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands"), simply because the determination of no malice is made on a motion for summary judgment rather than after a trial.[3]

Having determined Judge Haight applied the proper standard in granting summary judgment in a defamation action, we need only review for error his holding that the nine statements were not false or, in any event, not made with actual malice. Statement (a) was Barnes' response to Lando's query whether Herbert had formally every reported war crimes to him. Barnes stated, "He himself never did to me. Absolutely not." This portion of the interview was broadcast on "60 Minutes." Statement (b), also on the CBS broadcast, was a response by Franklin to Wallace's questions, in which Franklin stated,

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746 F.2d 1563 (D.C.Cir. 1984), *cert. granted,* —— U.S. ——, 105 S.Ct. 2672, 86 L.Ed.2d 691 (1985). Judge Scalia wrote that a judge in denying a libel defendant's motion for summary judgment must conclude that a reasonable jury could, on the basis of facts taken in the light most favorable to the public figure, find actual malice, but not that a reasonable jury could find actual malice with convincing clarity. 746 F.2d 1570-72. Judge Scalia believed the "convincing clarity" requirement was incompatible with the preliminary nature of summary judgment. *Id.* at 1571. *See also Hutchinson v. Proxmire,* 443 U.S. 111 & n.9, 99 S.Ct. 2675 & n.9, 61 L.Ed.2d 411 (1979) ("proof of 'actual malice' . . . does not readily lend itself to summary disposition"). The Supreme Court has granted certiorari and heard argument in *Liberty Lobby.*

[3] The Supreme Court recently held that the presence of actual malice is a question of law requiring an independent review of the record by appellate courts. *Bose Corp. v. Consumers Union of United States,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). *Bose,* however, involved an appeal of a finding of liability after the completion of a bench trial.

"I had many conversations with Colonel Herbert, we discussed many things but never war crimes." With respect to these statements, Judge Haight correctly noted the evidence produced by Herbert in an attempt to demonstate Lando should have known the statements were false was not available to Lando at the time of the broadcast. It is self-evident that information acquired after the publication of defamatory material cannot be relevant to the publisher's state of mind of his alleged malice at the time of publication. *See Washington Post v. Keogh*, 365 F.2d 965 (D.C.Cir.1966), *cert. denied*, 385 U.S. 1011, 87 S.Ct. 708, 17 L.Ed.2d 548 (1967). Judge Haight therefore correctly granted summary judgment for the defendants on these statements.

Statement (c) asserts that of several men interviewed, "none were certain that [Herbert] actually reported" war crimes to Franklin and Barnes. Indeed, the interviews reveal that two men who served under Herbert did back Herbert's story, but later recanted; another was "certain" only that he had told Lando he *believed* Herbert had reported war crimes to Franklin. Accordingly Judge Haight properly found that statement (c) was literally accurate.

Statements (d) and (e) concern Franklin's whereabouts on February 14, 1969, the day on which Herbert claims he reported the massacre of Cu Loi civilians to Franklin in Vietnam. Wallace stated in the broadcast that Franklin was on leave in Hawaii with his wife, and that the couple was registered at a hotel in Hawaii from February 7 to late in the afternoon on February 14. As additional evidence that Franklin was in Hawaii on the 14th, Wallace stated that Franklin wrote a check to the hotel "for the exact amount of the final bill, down to the last penny." Herbert claims these statements reflect factual inaccuracies—for example, the checkout bill at the hotel was actually for $25 more than the amount of

Colonel Franklin's check, and there is some evidence that either Colonel or Mrs. Franklin may have left Hawaii on the 13th or early on the 14th—and that at the time of the broadcast Lando was aware of this conflicting evidence.

In affirming Judge Haight's determination that these statements were not made with actual malice, we must emphasize our duty is to determine not whether the statements are true or false, but whether the publisher was aware that they were false or recklessly disregarded their truth or falsity. *New York Times v. Sullivan, supra.* It is equally important to note that recklessness, which Herbert alleges existed here, is not measured by whether a reasonable publisher would have published, but whether the publisher in fact "entertained serious doubts" as to "the truth of this publication." *See St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968). In light of the indeterminate evidence, we have little difficulty agreeing with the district court that Wallace's statements lacked the requisite actual malice.

Statement (g) was made when Wallace confronted Herbert with the fact that Herbert had "no documents to show, not a piece of paper to show that you ever reported a war crime to anybody prior to the time that the My Lai trials were going on at Fort McPherson, Georgia." Judge Haight found that Herbert had admitted in an unaired portion of the interview that he had no such documents. In light of his own admission, Herbert stands on weak ground when he argues the defendants published the statement with actual malice.

Herbert also claims the defendants acted with actual malice by publishing statement (h), an account by Robert Stemme, a special agent in Vietnam, that Herbert had declined to intervene in the interrogation and beating of a Viet Cong nurse. Herbert claims Stemme's account of the story differs from that of another agent, Fred Brown, whom Lando also interviewed. Although minor details of

the two versions do vary, the major facts in both accounts —that Herbert was present during the beating and did not attempt to stop it—are denied only by Herbert himself. Accordingly, the evidence is insufficient to show the defendants harbored any malice in publishing these facts.

Statement (j) appeared in the *Atlantic Monthly* article, and asserted: "It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes." Judge Haight ruled that "solid indication" was an expression of opinion, not fact, in that it represented Lando's evaluation of the evidence. We do not believe, however, a reasonable jury could find actual malice in light of the considerable evidentiary support for Lando's statement. It is, therefore, unnecessary for us to decide whether the assessment of evidence as "solid" is one of fact or opinion. Indeed, we could imagine circumstances in which an assertion that "no solid indication" exists might be so deliberately misleading as to be actionable. Because we are not faced with such a situation here, however, we affirm the district court's holding that this statement was not actionable.

Finally, Herbert challenges statement (k) in the magazine article, in which Lando wrote that New York Times reporter Wooten had come to believe in "most of [Herbert's] claims." Wooten himself, however, admitted in deposition that he "would not argue" with the passage and did not find it inaccurate. In light of this testimony, it would be testing the limits of imagination to suggest that a reasonable jury could find with convincing clarity that Lando wrote these words deliberately intending to misrepresent Wooten's state of mind about Herbert.

B. *"Overall Impact"*

Herbert also appeals Judge Haight's refusal to consider the "overall impact" of the "60 Minutes" broadcast

and the *Atlantic Monthly* article as a separate actionable basis for a defamation suit. Instead, Judge Haight held that in response to a summary judgment motion, a defamation plaintiff is obliged to specifically identify those statements which he claims were made with actual malice. 596 F.Supp. at 1197. Herbert claims the overall impact of the publications was defamatory and made with actual malice, and he urges Judge Haight should have taken into consideration the defamatory nature of the publications as a whole rather than only specific statements. We disagree. For the following reasons we hold the "overall impact" of the "60 Minutes" broadcast and the magazine article does not in itself constitute a cause of action.

For purposes of this analysis we distinguish between an overall defamatory *impact*, such as Herbert alleges exists here, and a particular defamatory *implication*, which in certain circumstances might be actionable. In the latter instance, a combination of individual statements which in themselves may not be defamatory might lead the reader to draw an inference that is damaging to the plaintiff. *See, e.g., Church of Scientology of California v. Flynn*, 744 F.2d 694 (9th Cir.1984); *Cianci v. New Times Publishing Co.*, 639 F.2d 54 (2d Cir.1980).[4]

This case presents a different situation. Here, the defamatory "impact" of the publication is the same as

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[4] If, for example, a newspaper account of a rash of neighborhood thefts also reported that a public figure had recently moved into the neighborhood, purchased tools commonly used in burglaries, and had been seen near a number of homes where burglaries had occurred, a reader would be led to believe that the individual described had committed the crimes. Such a deductive inference might well be actionable if there is proof the article was published with actual malice. *See* Keeton, *Defamation and Freedom of the Press*, 54 Tex.L.Rev. 1221, 1250-51 (1976); Note, *Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege*, 34 Rutgers L.Rev. 81, 100 (1981). While each individual statement alone might be literally accurate, in the aggregate they give rise to a false and defamatory inference.

the defamatory implication conveyed by each of the individual statements. That implication, as we shall later see, is that Herbert lied about reporting war crimes to his superiors in Vietnam and therefore must have been relieved of command for other reasons. Examining each of the specific statements Herbert claims was made with actual malice, however, we do not find a distinction between the defamatory meaning a viewer would derive from the particular statements, and the supposedly larger defamatory "impact" Herbert insists is conveyed by the publication as a whole.[5]

The CBS broadcast of Colonel Franklin's denial of Herbert's charges, for example, corresponds exactly with the program's overall suggestion that Herbert lied about reporting war crimes. Moreover, Lando's article stated that there was no "solid indication" that Herbert began thinking about reporting war crimes until the My Lai trials had begun. This statement strongly suggests Herbert was capitalizing on the nation's concern about war crimes to excuse his relief from command. Finally, CBS related Stemme's account of Herbert's presence during the beating of a Viet Cong nurse, leading the viewer to conclude Herbert himself had condoned acts of brutality. Herbert has properly identified the specific statements that were allegedly made with actual malice. To permit Herbert to rest a cause of action in this case on the publication's "overall impact" would be a meaningless gesture, since the defamatory implications of the specific

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[5] Herbert contends the CBS broadcast and the magazine article presented several defamatory allegations as a whole, including: (1) Herbert lied about reporting war crimes to his military superiors; (2) the publicity surrounding the My Lai massacre prompted Herbert to invent his story, suggesting that Herbert would use his country's concern over war crimes as a means of explaining his relief from command; (3) Herbert condoned and participated in brutal, violent and sadistic acts against the Vietnamese population and prisoners, and (4) Herbert lied about his experiences in his book *Soldier*.

statements and the overall impact of the publications are identical.

C. *Dismissal of Atlantic Monthly*

Judge Haight granted summary judgment for *Atlantic Monthly* and dismissed the complaint against the magazine. We find his reasons for dismissal compelling. Our independent review of the evidence for actual malice, as required by the Supreme Court in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), reveals to us no indication the *Atlantic Monthly* exercised actual malice in publishing Lando's article.

The gravamen of Herbert's claim is that the magazine, by failing to further investigate the charges made by Lando against Herbert, exercised actual malice by publishing an article it knew contained false statements, or recklessly disregarded the possible falsity of the publication. We reiterate, however, that a finding of actual malice cannot be predicated merely on a charge that a reasonable publisher would have further investigated before publishing. *St. Amant v. Thompson, supra*, 390 U.S. at 731, 88 S.Ct. at 1325. Rather, a public figure defamation plaintiff must show either that the publisher actually entertained serious doubts about the veracity of the publication, or that there are "*obvious* reasons to doubt the veracity of the informant or the accuracy of his reports." *Id.* (emphasis added).

In light of this heavy burden of proof, the purported evidence of actual malice cited by Herbert is unconvincing. Herbert claims, for example, that the editors were aware that Lando had once expressed hostility to Herbert[6] and knowedge of this confrontation should have

[6] After Wallace conducted a filmed interview of Herbert at CBS studios in New York, an argument ensued between Herbert and Lando during which Lando is alleged to have shouted, "I'll get you" and "I'll destroy you."

raised "serious doubts" in their minds about the accuracy of Lando's article. In fact, however, the editors, alerted to the existence of the hostile encounter between Herbert and Lando, encouraged Lando to include a description and explanation of the incident in his article, which Lando did. These actions are indications of responsible editorial behavior, not actual malice. *See Food-Science Corp. v. McGraw-Hill*, 592 F.Supp. 362 (D.Vt. 1984). Moreover, Lando's animosity towards Herbert, while putting the *Atlantic* on notice, does not in itself establish the article was false or that the editors should have known any part of it was false. *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir. 1977), *cert. denied*, 434 U.S. 834, 98 S.Ct. 120, 54 L.Ed.2d 95 (1977).[7]

Herbert also cites as evidence of actual malice the magazine's post-publication receipt of several documents refuting Lando's version of Herbert's experiences. These documents include a nine-page "bill of discrepancies" submitted to the *Atlantic* by Herbert's literary agent, in a form unsuitable for publication; a poorly written article by a Tennessee reporter supporting Herbert's story; and two letters to the editor written by acquaintances of Herbert. The author of one letter claimed that Lando had hung up the phone when he tried to support Herbert's account of events in the Middle East. The other letter was critical of the way the Army treated Herbert when it administered a lie detector test to him. From this evidence, Herbert contends, a jury could infer reckless disregard by *Atlantic Monthly* at the pre-publication stage.

We must reject Herbert's argument. As we indicated earlier, inaccuracies brought to the attention of the pub-

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[7] Particularly relevant to the state of mind of the *Atlantic* editors in publishing the article was their knowledge that CBS had already determined the substance of Lando's report fit for publication. Moreover, *Atlantic Monthly* had considerable reason to trust Lando's reliability as a reporter, having previously published an article written by Lando, and having learned upon inquiry of his former employer, *Time* magazine, that he had a respected reputation.

lisher after publication are not relevant to the publisher's state of mind before publication. *Rosenbloom v. Metromedia*, 403 U.S. 29, 55, 91 S.Ct. 1811, 1825, 29 L.Ed.2d 296 (1971); *Gertz v. Robert Welch, Inc.*, 471 F.2d 801, 804 (7th Cir. 1972), *rev'd on other grounds*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *McManus v. Doubleday*, 513 F.Supp. 1383, 1390 (S.D.N.Y. 1981). Moreover, behavior such as the refusal to publish dissenting points of view is not alone sufficient to support an allegation of actual malice before publication. Properly read, *New York Times v. Sullivan* does not support the theory that a mere inference of actual malice, derived from post-publication behavior, could defeat a motion for summary judgment.[8]

III. CROSS-APPEAL

We now approach the most difficult question presented to us on this appeal: Should Judge Haight have granted summary judgment in favor of the defendants on the two statements he found merited a trial? One appeared in the *Atlantic Monthly* article, and the other was heard on the "60 Minutes" telecast. On cross-appeal, the appellees argue that the district court erroneously denied their motion for summary judgment on these two statements. We agree that the remaining statements are not actionable, and therefore remand to the district court with instructions to enter an order granting summary judgment to the defendants and dismissing the complaint.

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[8] Although it is not essential to our holding, we note the *Atlantic Monthly* did publish two letters in its July, 1973 issue that were generally critical of Lando's article.

We do not agree with Herbert that the article's graphics and the prefatory "streamer" are sufficient manifestations of the magazine's endorsement of the article to render the *Atlantic* independently liable for the article's content. Rather, we view the streamer and graphics as little more than the minimal packaging required to make the piece readable and attractive.

The statement appearing in the *Atlantic Monthly* struck at Herbert's credibility with respect to a statement he had made to Lando:

> Herbert had also claimed that one of the brigade's top enlisted men, Sergeant Major John Bittorie, had been listening in an outer office when Herbert reported to Colonel Franklin an incident of water torture. When the Army CID questioned him, Bittorie denied Herbert's claim. Herbert told me the reason was that although Bittorie himself was retired, he still had two sons in the service and had to worry about their careers. But when I flew to Columbus, Georgia, to interview Bittorie, he again denied having overheard any such report. What about his sons who are in the Army? I asked. *He had no sons.*

596 F.Supp. at 1212.

Herbert submitted an affidavit, executed by Bittorie, attesting to the fact that he had informed Lando he was the father of both a son and a daughter, and that when Bittorie had spoken with Herbert the son was indeed serving in the Army. Based on this evidence, Judge Haight ruled a jury could find that Lando published his statement with knowing falsity, and therefore held this statement to be actionable.

The second statement was made by Mike Wallace in the "60 Minutes" broadcast:

> We have spoken with many men who saw Herbert after his relief in Vietnam . . . to a man they say that Herbert never once said to them that he had been relieved because he had tried to push war crimes charges.

596 F.Supp. at 1217. As Judge Haight recognized, it is clear from the context of the broadcast that Wallace was focusing on whether Herbert had made his claim while still in Vietnam.

Herbert contended in the district court that three individuals had told Lando the precise opposite—that Herbert had in fact told them he was relieved because he had tried to report war crimes. Judge Haight correctly refused to consider the affidavits of two of these individuals, because Herbert spoke with them about his relief from command only after he returned from Vietnam. Judge Haight then found, however, that one individual—a helicopter pilot named Kahila—claimed that in Vietnam Herbert had told him that Herbert was relieved because "of Army politicking resulting from his reporting the Cu Loi killings. . . ." Viewing this affidavit as creating an issue of credibility inappropriate for resolution on summary judgment, Judge Haight ruled the statement was actionable.

In urging this Court to reverse the district court holding related to the two remaining statements, appellees rely on the incremental harm branch of the libel-proof doctrine.[9] This novel theory was first applied by Judge Weinfeld in *Simmons Ford, Inc. v. Consumers Union*, 516 F.Supp. 742 (S.D.N.Y. 1981). *See generally* Note,

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[9] The libel-proof doctrine was first introduced in this Circuit in *Cardillo v. Doubleday & Co.*, 518 F.2d 638 (2d Cir. 1975). Robert Cardillo was a convicted figure in organized crime who sued Doubleday for publishing a book in which Cardillo was mentioned as having participated in various criminal enterprises. The district court granted summary judgment for the defendants and dismissed the action, holding that Cardillo had not shown the existence of actual malice under the *New York Times v. Sullivan* standard. On appeal, Cardillo argued that the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, handed down after the district court's decision, permitted the actual malice standard to be disregarded by state libel law in cases involving neither public figures nor public officials. This court found it unnecessary to address the question of New York state law because it determined Cardillo to be "libel-proof"—that is, "so unlikely by virtue of his life as a habitual criminal to be able to recover anything other than nominal damages as to warrant dismissal of the case, involving as it does First Amendment considerations." 518 F.2d at 639.

The Libel-Proof Plaintiff Doctrine, 98 Harv.L.Rev. 1909 (1985). In *Simmons Ford*, defendant's magazine, a periodical for consumers, published a critical evaluation of plaintiff's new electric car and rated it "Not Acceptable." The accompanying article enumerated a great many reasons for the low rating, including poor acceleration, low top speed, poor braking, poor handling, poor ride, poor comfort and generally negative performance. The only portion of the article challenged by plaintiff was a paragraph asserting that the car did not meet federal safety regulations. The regulations referred to in the article set forth applicable standards for cars equipped with passive restraints such as airbags. In fact, however, the electric car was equipped with seatbelts, which were regulated by a separate set of standards. The article, therefore, implied the car did not meet federal safety standards that in reality were inapplicable to the car. Judge Weinfeld ruled there was ample basis in fact to justify defendant's conclusion that the car was "not acceptable," and further adverse comment about the car could not give rise to more than nominal damages. Accordingly, he granted summary judgment for the magazine.

This branch of the "libel-proof" doctrine thus measures the incremental harm inflicted by the challenged statements beyond the harm imposed by the rest of the publication. If that harm is determined to be nominal or nonexistent, the statements are dismissed as not actionable. *Simmons Ford, Inc. v. Consumers Union, supra*; *see Bose Corp. v. Consumers Union of United States*, 529 F.Supp. 357, 362 (D.Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984); *Sharon v. Time, Inc.*, 575 F.Supp. 1162 (S.D.N.Y. 1983). Judge Haight, however, declined to apply the "libel-proof" doctrine in this case because Herbert, unlike the plaintiff in *Simmons Ford*, challenged not just one, but many statements he believed were false and defamatory in the pub-

lication. Because he believed that a plaintiff who could not produce evidence of actual malice as to certain statements was not necessarily conceding the truth of those statements, Judge Haight deemed it inequitable to preclude Herbert from producing evidence of actual malice on the remaining statements before the trier of fact.

We believe, however, a reasoned and different ground exists in this case for granting summary judgment on the remaining two statements.[10] To begin our analysis, we return to the nine statements dismissed by Judge Haight as nonactionable because their publication bore no evidence of actual malice. On the basis of these very statements, we believe the appellees had ample grounds to support their conclusion that Herbert had not reported war crimes to his superiors in Vietnam, and therefore must have been relieved of command for other reasons. Reviewing the evidence presented in affidavits and depositions, we are led to conclude that CBS, Lando and Wallace knew that both Barnes and Franklin denied having received reports of war crimes from Herbert; that no one could verify from personal knowledge Herbert's insistence that he reported war crimes to Barnes and Franklin; and that the first substantiated accusations against his superiors were made by Herbert seventeen months after his relief from command, and after Herbert had returned to the United States. In light of this evidence, the appellees could not be said to have had actual malice in publishing their view that (1) Herbert lied about reporting war crimes to his superiors in Vietnam, and (2) Herbert's relief from command must therefore have been for other reasons.

Having decided the appellees did not publish these views with actual malice, we confront the question whether Herbert should be allowed to base his defama-

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[10] Some may view our holding today as a variation of the "libel-proof" doctrine, but we need not so characterize it.

tion action solely on inaccuracies contained within statements subsidiary to these larger views. The first statement, which appeared in the magazine article, was defamatory only in that the incorrect assertion that "Bittorie had no sons" implied that Bittorie was more credible than Herbert had suggested. Accordingly, this implication strengthened Lando's portrayal of Herbert as a man who lied about reporting war crimes to his superiors.[11] We have already agreed, however, that given the amount of other evidence supporting this view, the appellees did not publish this conclusion with actual malice. Because we consider Herbert's truthfulness in assessing Bittorie's credibility to be merely a subsidiary matter to the primary, non-actionable issue—whether Herbert lied about reporting war crimes—we hold this statement as well to be nonactionable.

The second statement, delivered by Mike Wallace on "60 Minutes," contained the assertion that "to a man," those who spoke with Wallace and his staff said that Herbert never told them in Vietnam that he had been relieved for reporting war crimes. Admittedly, this statement undermines Herbert's credibility with respect to his assertion that he reported war crimes. We have already held, however, that the appellees did not have actual malice in publishing their view that Herbert was relieved for reasons other than his allegations of war crimes. The only potentially defamatory inference that could be drawn from Wallace's statement is that Herbert was re-

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[11] The chain of reasoning is somewhat elaborate. The statement that Bittorie had no sons implied that Bittorie lacked the motive (protection of his sons' army careers) ascribed to him by Herbert as Bittorie's reason for not corroborating Herbert's account of reporting war crimes to Franklin. The fact that Bittorie had a son was some evidence that Bittorie did have a motive to lie when he denied overhearing Herbert report war crims to Franklin. If Bittorie had a motive to lie, this was some evidence that Bittorie was lying. If Bittorie was lying, this was some evidence that Herbert had reported war crimes to Franklin.

lieved from command for reasons other than reporting war crimes. But we have already held this not to be actionable.

We do not mean to imply by our holding that appellees could have published with impunity a vast collection of false statements so extensive as to portray Herbert as a liar in every respect. Such a portrayal may well be actionable. Rather, we hold that if the appellees' published view that Herbert lied about reporting war crimes was not actionable, other statements—even those that might be found to have been published with actual malice—should not be actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery. We do not intend by our holding to permit defamation defendants to freely embellish their stories with falsehoods while remaining free from liability. In this case, however, the abundance of other evidence supporting the appellees' skepticism of Herbert's story was sufficient to justify the district court's finding of no malice. Our holding is thus limited to those cases in which statements allegedly made with knowing falsity or reckless disregard give rise to defamatory inferences that are only supportive of inferences that are not actionable.[12] For Herbert to base his defamation action on subsidiary

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[12] Judge Haight reckoned with the view we have expressed, but concluded, with reference to the "Bittorie's sons" statement, that the statement was actionable because it had two implications: "a particular one (Herbert did not report water torture to Franklin), and a general one (Herbert tells lies)." 596 F.Supp. at 1213. Judge Haight concluded that the latter implication rendered the statement actionable. The reason we disagree is that the statement does not imply that Herbert, in general, is a liar. It implies, at most, that he told a lie in his effort to counter the claim that he had not reported war crimes. We would have a very different case if a statement, otherwise actionable, implied that Herbert was generally a liar or even that he had lied on some significant matter unrelated to the truth of statements determined not to be actionable.

statements whose ultimate defamatory implications are themselves not actionable, we believe would be a classic case of the tail wagging the dog.

Our decision today calls for the granting of summary judgment on the remaining two statements simply because their defamatory implictions are not actionable. We therefore need not decide whether a court can grant summary judgment on separate, unrelated statements, which may have been made with actual malice, pursuant to the incremental harm branch of the libel-proof doctrine.

We do not believe that Herbert has presented a claim suitable for disposition at trial, and therefore the district court should have granted summary judgment for all defendants. Thus this protracted litigation, which has been filed with anger, charges and countercharges in an area of the law where emotions frequently obfuscate the facts and law, has finally come to a close in this Court.

IV. CONCLUSION

Accordingly, the judgment of the district court is affirmed in part, reversed in part, and remanded with instructions that summary judgment be entered for defendants and the complaint be dismissed.

APPENDIX

In his papers opposing defendants' motion for summary judgment, Herbert specified the following eleven statements as having been made with actual malice:

(a) On the program, in answer to Lando's question to Barnes whether "Herbert ever formally or informally reported any war crimes or atrocities" to him, Barnes stated, "He himself never did to me. Absolutely not." Lando knew, however, that Herbert had reported POW mistreatment at the An Khe compound through his XO, Bethea, who immediately conveyed the information to Barnes.

(b) On the program and in the article, in answer to Wallace's questions, Franklin stated that Herbert "never" reported war crimes or atrocities of any nature to him "In no way, either orally or in writing. I had many conversations with Colonel Herbert, we discussed many things but never war crimes." Lando knew, however, that Herbert had discussed the An Khe mistreatment with Franklin and that Franklin conceded Herbert "possibly" discussed with him mistreatment of the Vietnamese by American advisors and ARVN forces.

(c) Wallace stated, "Several men serving under Herbert said they had heard Herbert say, while in Vietnam, that he had reported the February 14 killings, but none were certain that he had actually reported them." In fact, both Lando and Wallace knew that (1) not several, but many men while in Vietnam heard Herbert say he had reported the Cu Loi killings; (2) many men heard, in addition, Herbert's warnings that war crimes and atrocities, like Cu Loi, were absolutely prohibited; (3) several men had not only heard Herbert say he had reported the February 14 murders but several men *themselves* heard or saw

Herbert reporting the killings. (emphasis in original).

(d) Wallace stated that Franklin's check for his Hawaii hotel room was "for the exact amount of the hotel bill" (Pr.Tr. 6), while the article stated that the check was made out "for the exact amount of the final bill, down to the last penny" (Art. p. 77). Both Lando and Wallace knew that Franklin's check was not for the "exact amount," but $25 less than the hotel's final bill.

(e) On the program, Wallace stated: "checking with the Ilikai Hotel in Hawaii, we found that Colonel and Mrs. Franklin had indeed been registered there from February 7 to late in the afternoon of February 14 (Pr.Tr. 6) CBS knew that the Ilikai records revealed that either Col. or Mrs. Franklin left on February 13 or "early the 14th," but not which, and Lando considered it a "toss-up" as to which was the case.

(f) Lando wrote Bittorie "had no sons" (Art. p. 78). In fact, as Lando was told by Bittorie, he had a son.

(g) Wallace stated, "you have no documents to show, not a piece of paper to show that you ever reported a war crime to anybody prior to the time that the My Lai trials were going on at Fort McPherson, Georgia" (Pr.Tr. 7), while defendants knew that Herbert's report of the An Khe mistreatment, the Arnold Report, and Boyer's statement of September 10, 1969, were all "pieces of paper" which showed Herbert reported a war crime to somebody prior to the My Lai trials.

(h) Wallace stated that Stemme described Herbert as present "as a Viet Cong nurse was being interrogated by ARVN troops, being beaten by them to

get her to talk" (Pr.Tr. 12). In fact, Lando knew that was not what Stemme had told him.

(i) Wallace stated: "We have spoken with many men who saw Herbert after his relief in Vietnam . . . to a man they say that Herbert never once said to them that he had been relieved because he had tried to push war crimes charges" (Pr.Tr. 9). Lando had been told, in words or substance, the exact opposite by at least three men whom he spoke to whom [sic] had seen Herbert after his relief.

(j) The article stated: "It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes" (Art. p. 79). Lando knew from numerous people he spoke to that Herbert talked in Vietnam about the war crimes and having reported them and that he had been seen or heard talking about the Cu Lois murders on the radio and at Brigade headquarters.

(k) Lando wrote that Wooten has come to believe in "most of [Herbert's] claims" (Art. p. 74) when Wooten never limited his belief in Herbert.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 74 Civ. 434-CSH

ANTHONY HERBERT,
Plaintiff,
v.
BARRY LANDO, MIKE WALLACE,
COLUMBIA BROADCASTING SYSTEM, INC.,
ATLANTIC MONTHLY COMPANY,
Defendants.

Oct. 10, 1984
As Amended Oct. 18, 1984

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

This is an action for defamation. Jurisdiction in this Court is based upon diversity of citizenship. Following extensive discovery, all defendants now move for summary judgment under Rule 56, F.R.Civ.P.

I.

Introduction

The Parties

Plaintiff Anthony Herbert is a retired Army officer who had extended wartime service in Vietnam and who received widespread media attention when he accused his superior officers of covering up reports of atrocities and

other war crimes, and of relieving him of his combat command when he persisted in such reports.

Defendants Barry Lando, Mike Wallace, and Columbia Broadcasting System, Inc. ("CBS") were involved with a television report on Herbert and his accusations which CBS broadcast on February 4, 1973 as part of its weekly "60 Minutes" program. Lando and Wallace were CBS employees. Lando researched and produced the program segment dealing with Herbert. Wallace narrated it, and also participated in preliminary interviewing and editing.

Lando thereafter wrote an article relating to Herbert which defendant Atlantic Monthly ("Atlantic Monthly") published in its May, 1973 issue.

The Allegations of the Complaint

Herbert's complaint contains two counts. Count One alleges that the February 4, 1973 "60 Minutes" program entitled "The Selling of Colonel Herbert" (hereinafter "the program") defamed him. The defendants in this count are Lando, Wallace, and CBS. Count Two alleges that Lando's article appearing in the May, 1973 issue of *The Atlantic Monthly* magazine entitled "The Herbert Affair" (hereinafter "the article") also defamed him. The defendants in Count Two are Lando and Atlantic Monthly.

Specifically, Herbert alleges that the program and the article defamed him in the following respects, as summarized in plaintiff's brief on the present motion at 2-3:

> "1. Herbert is presented as not having reported war crimes to his superior officers, Col. J. Ross Franklin and Brig. Gen. John W. Barnes, while serving as Commander, 2d Battalion with the 173d Airborne Brigade in Vietnam, and thereby portrayed as a liar and as one guilty of violating the very military laws he accused his commanders of violating;

"2. Herbert is presented as never mentioning war crimes until My Lai became public, and thereby portrayed as a liar who falsely used the country's concern over war crimes as a means of explaining his own relief from command of the 2d Battalion of the 173d;

"3. Herbert is presented as a man capable of brutal acts and condoning brutality against the Vietnamese population, detainees and prisoners, and thereby portrayed as a violent, sadistic and brutal man who violated the rules that were to govern his behavior as a soldier and an officer and who hypocritically accused others of criminal behavior of which he was guilty;

"4. Herbert is presented as a man who repeatedly lied not only in his charges regarding war crimes and command cover-up but also in his book *Soldier* concerning a number of events, and thereby portrayed as a liar and a fraud."

The Asserted Defenses

Defendants Lando, Wallace and CBS assert four defenses to the complaint. Wallace and CBS are concerned only with the program. Lando, who produced the program and wrote the Atlantic Monthly article, asserts the same four defenses in respect of both.

The first defense asserted by these defendants is premised upon *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and its progeny. While the defendants contend that the program and the article are careful and accurate reports of the Herbert controversy, they also contend that in any event, no reasonable jury could find that the defendants published with actual malice. On this branch of their argument, defendants assert that the pre-trial discovery and the additional exhibits submitted with the motion demonstrate as a mat-

ter of law that at trial, Herbert could not meet his burden of showing by clear and convincing evidence that the defendants had knowledge of falsity or acted with reckless disregard for the truth. In these circumstances, the argument concludes, summary judgment should now be entered dismissing the complaint.

Secondly, these defendants contend that the program and the article constitute protected reportage of a public controversy about a public figure and public official. That argument is premised primarily upon the Second Circuit's opinion in *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.1977).

Third, these defendants contend that the program and article constitute protected expressions of opinion about a public figure and a public controversy.

Lastly, these defendants contend that the selection of information for inclusion in the program and article was a matter of editorial judgment as to which the courts have no role.

Defendant Atlantic Monthly, as publisher of the article, relies upon the first of these defenses, arising from the principles declared in *New York Times Co. v. Sullivan* and later cases.

History of the Litigation

Following filing of the complaint and joinder of issue, extensive discovery ensued. A time came, however, when the CBS defendants (Lando, Wallace and their corporate employer) balked at giving discovery in respect of what they termed their "editorial process."

Specifically, Herbert sought to inquire into Lando's conclusions and state of mind during the course of his research; conversations between Lando and Wallace about matters to be included or excluded from the broadcast publication; and Lando's intentions as manifested by his

decision to include or exclude certain material. This Court held that Herbert was entitled to discovery in these areas. 73 F.R.D. 387 (S.D.N.Y.1977). A divided panel of the Second Circuit reversed. 568 F.2d 974 (2d Cir. 1977). The Supreme Court granted certiorari and reversed the Court of Appeals, reinstating this Court's judgment. 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). Thereafter considerable additional discovery took place.

Upon completition of discovery these motions were filed. No party suggests that additional discovery is required, or even possible. The present record constitutes the record that would be made at trial. Defendants' motions test whether a trial is necessary.

The first sections of this opinion will consider the issue of "actual malice" arising out of *New York Times v. Sullivan* and later cases. I begin that consideration with preliminary discussions of plaintiff's burden of proof, and the standards to be applied in evaluating a defendant's motion for summary judgment.

II.

The Burden of Proof Applicable to a Public Figure Who Sues for Defamation

Plaintiff Herbert's cause of action arises under New York State defamation law. However, in *New York Times v. Sullivan* the Supreme Court announced a constitutional rule. It is that, with respect to the alleged libels of public officials, the First and Fourteenth Amendments preclude recovery absent proof that the defendant had published a damaging falsehood "with 'actual malice' —that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan, supra,* 376 U.S. at 280, 84 S.Ct. at 726. "The approach of *New York Times* was to identify

a class of person—there public officials—and a type of activity—there official conduct—and to require as to defamations respecting them a particularly high standard of liability—knowing falsehood or reckless disregard of the truth." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971). The *New York Times* rule was extended to "public figures" by *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

In the case at bar, Herbert concedes that by reason of his much publicized charges against the Army and his superior officers, he is a "public figure" within the meaning of the *New York Times* rule. Indeed he is. The Second Circuit recently summarized the criteria. An individual is a "limited purpose public figure" if he has: "(1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media." *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123 (2d Cir., 1984) at 136. Herbert's much publicized war with the Army satisfies all these criteria.

Defendants argue that by virtue of his former military rank, Herbert should also be regarded as a "public official." Herbert disputes that characterization. I need not resolve the issue, because the burden of proof falling upon Herbert under the *New York Times* rule is in either event the same.

That burden was most recently articulated by the Supreme Court in *Bose Corp. v. Consumers Union of U.S. Inc.*, —— U.S. ——, —— n. 30, 104 S. Ct. 1949, 1965 n.30, 80 L.Ed.2d 502 (1984):

> "The burden of proving 'actual malice' requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement."

As Judge Friendly observed for the Second Circuit in *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 59 (1980), a plaintiff "within the ambit of *Sullivan*" also has, "at least as a practical matter, the burden of proving falsity, since he must in any event establish that defendant published with knowledge of falsity or reckless disregard of the truth." However, the Supreme Court in *Bose* specifically recognized that "there is a significant difference between proof of actual malice and mere proof of falsity," 104 S.Ct. at 1965.

Proof of actual malice is a more stringent burden. It requires a public figure plaintiff to demonstrate actual malice by "clear and convincing evidence." Under the "clear and convincing" burden, "a mere preponderance of the evidence is not enough." *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977). The "clear and convincing" standard is "intermediate between the normal 'preponderance of the evidence' civil standard and the 'beyond the reasonable doubt' criminal standard," *Yiamouyiannis v. Consumers Union of the U.S., Inc.*, 619 F.2d 932, 940 (2d Cir. 1980), quoting *Nader v. de Toledano*, 408 A.2d 31, 49 (D.C.1979), *cert. denied*, 444 U.S. 1078, 100 S.Ct. 1028, L.Ed.2d 761 (1980).

New York Times articulated two bases for a finding of "actual malice": publishing with knowledge that the statement was false, or with reckless disregard of whether it was false or not. "Knowledge of falsity" means what it says. Later cases further define the concept of "reckless disregard" for truth. In *Herbert v. Lando, supra*, the Supreme Court said that "absent knowing falsehood, liability requires proof of reckless disregard for truth,

that is, that the defendant 'in fact entertained serious doubts as to the truth of his publication.'" 441 U.S. at 156, 99 S.Ct. at 1638, quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968). As *Gertz v. Robert Welch Inc.*, *supra*, makes clear and *Bose Corp. v. Consumers Union of U.S., Inc.*, *supra*, reiterates, the plaintiff must prove on the part of the defendant a "subjective awareness of probable falsity," *Gertz*, at 418 U.S. 335, n. 6, 94 S.Ct. at 3005 n. 6; such a finding may be inferred if, *inter alia*, "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant v. Thompson*, *supra*, 390 U.S. at 732, 88 S.Ct. at 1326. And in *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964), the Court characterized statements made in reckless disregard of truth as "those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* . . . ." This formulation in *Garrison*, a state prosecution for criminal libel, is pertinent because in *Herbert v. Lando*, the Court cited *Garrison* for the proposition that "[c]riminal libel prosecutions are subject to the same constitutional limitations" as pertain to defamation actions by public officials or public figures. 441 U.S. at 156 n. 1, 99 S.Ct. at 1631 n. 1.

The element of subjective awareness is critical to the *New York Times* line of authority. It is sufficient for a public figure plaintiff to prove that the defendant publisher, judged by the objective standard of the reasonable man, should have known that the defamatory statement was false; or that further investigation would have revealed the falsity. "[E]rrors of fact caused by negligence" are not compensable under *New York Times*. *Time, Inc. v. Pape*, 401 U.S. 279, 292, 91 S.Ct. 633, 640, 28 L.Ed.2d 45 (1971). A trial judge may not instruct the jury that the defendant publisher's liability turns upon whether or not he acted with a "belief founded on reason-

able grounds of the truth of the matter published," since that standard "is far less stringent than that of knowing falsehood or reckless disregard of the truth," *Monitor Patriot Co. v. Roy, supra,* 401 U.S. at 273, 91 S.Ct. at 626. These related principles are summarized in *St. Amant v. Thompson, supra,* 390 U.S. at 731, 88 S.Ct. at 1325:

> ". . . reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

In *Herbert v. Lando, supra,* the Court observed that:

> ". . . *New York Times* and its progeny made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant. To be liable, the alleged defamer of public officials or of public figures must know or have reason to suspect that his publication is false. In other cases proof of some kind of fault, negligence perhaps, is essential to recovery." 441 U.S. at 160, 99 S.Ct. at 1640 (footnote omitted).

Citing *Herbert,* the Second Circuit held in *Lerman, supra,* that " 'actual malice' as is implied in that expression is a subjective test focused on the defendant's state of mind." At 140. The state of mind requisite for liability is knowledge of actual or probable falsity. Cf. *Herbert v. Lando, supra,* at 172, 99 S.Ct. at 1646. "If such proof results in liability for damages which in turn discourages the publication of erroneous information *known to be false or probably false,* this is no more than what our cases contemplate and does not abridge either freedom of speech or of the press" (emphasis added).

III.

Applicable Standards in Evaluating Defendants' Summary Judgment Motions

The standards to be applied by trial courts in this Circuit in evaluating a defendant's motion for summary judgment on the "actual malice" issue are set forth in *Yiamouyiannis, supra.* The public figure defamation case is regarded for summary judgment purposes as any other; "neither grant nor denial of a motion for summary judgment is to be preferred." 619 F.2d at 940. However, as Judge Oakes observed in *Yiamouyiannis,* the court need not be concerned by the general inappropriateness of summary judgment to "state of mind" issues where (as in the case at bar) "the evidence on actual malice has been fully marshalled" by pre-trial discovery, and the parties do not "seek or suggest the need of further discovery. . ." *Ibid.* In such circumstances, *Yiamouyiannis* describes the proper procedure in these terms:

> "In a case where the defendant has moved for summary judgment on the issue of actual malice and the plaintiff claims that there remain material factual disputes, the court decides the materiality of the disputed facts by accepting the plaintiff's version and applying the actual malice standard. This standard requires a clear and convincing showing, which may be by circumstantial evidence, of defendant's actual state of mind—either subjective awareness of probable falsity or actual intent to publish falsely. Therefore, a judge in denying a defendant's summary judgment motion must conclude that, based on the evidence asserted in the plaintiff's affidavits, 'a reasonable jury *could find* malice with convincing clarity.'" 619 F.2d at 940 (quoting *Nader v. de Toledano, supra,* at 49, emphasis in original).

To state the converse, a defendant should be granted summary judgment if "a properly instructed jury could not fairly and rationally conclude upon clear and convincing evidence" that defendant's publications of false and defamatory statements "were knowing or made with actual malice," thereby demonstrating "defendant's requisite fault with respect to the factual error disseminated," *Lerman, supra,* at 141, 142.

Such a ruling is one of law, not fact. The public figure, plaintiff, to survive a motion for summary judgment, is not required to prove actual malice with convincing clarity *to the motion judge. Nader v. de Toledano, supra,* at 408 A.2d 49. Resolution of genuine issues of fact are for the jury. But where it appears that no reasonable jury could find actual malice with convincing clarity, the defendant is entitled to summary judgment.

Having made these general observations, one must also recall the Supreme Court's recognition in *St. Amant v. Thompson, supra,* that the concept of "reckless disregard . . . cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law." 390 U.S. at 730-731, 88 S.Ct. at 1325. Thus the evidence in each case with respect to the allegedly false and defamatory statements must be carefully analyzed. Where, viewing the evidence in the light most favorable to plaintiff, a reasonable jury could make the requisite finding of actual malice, the case is for the jury. *Goldwater v. Ginzburg,* 414 F.2d 324, 337 (2d Cir.1969), *cert. denied,* 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed.2d 695 (1970). It is equally clear, however, that in an appropriate case summary judgment in favor of defendant will lie. *Yiamouyiannis, supra; Lerman, supra; Loeb v. New Times Communications Corp.,* 497 F.Supp. 85

(S.D.N.Y.1980); *Reliance Insurance Co. v. Barron's*, 442 F.Supp. 1341 (S.D.N.Y.1977).

In light of these authorities, I turn to the particulars of the case at bar.

IV.

Genesis of the Program

Herbert is a much-decorated soldier who enlisted in the United States Army as a private in 1947. at the age of 17. He retired on February 29, 1972 with the rank of Lieutenant Colonel.

Herbert served in Vietnam from September 1968 to July 1969. From February 6 to April 4, 1969, he commanded the 2d Battalion of the 173d Airborne Brigade. General John W. Barnes commanded the brigade. Colonel J. Ross Franklin was deputy commander.

On April 4, 1969 Barnes relieved Herbert of his command of the 2d Battalion. From April 5 to July of 1969 Herbert was assigned to the Capital Military Assistance Command in Saigon.

Herbert protested his relief from command by Barnes. While at Saigon he initiated a proceeding under Article 138 of the Uniform Code of Military Justice, 10 U.S.C. § 938, seeking redress on the ground that his relief had been without justification. Major General Joseph R. Russ presided over a board which, after hearing a number of witnesses including Herbert, Barnes, and Franklin, denied Herbert redress.

Herbert was transferred from Vietnam and reported to the Command and General Staff College at Fort Leavenworth in July of 1969. Subsequently he was assigned to Fort McPherson. On September 28, 1970 Herbert filed with the Inspector General's office at Fort McPherson formal charges that war crimes and atrocities were committed in Vietnam by elements of the 173d Airborne

Brigade. Herbert also filed charges against Barnes and Franklin for failure to investigate or report those incidents, which Herbert listed specifically. These charges generated three investigations by the Army's Criminal Investigation Department ("CID"). Herbert also sought review of the negative efficiency report accompanying his relief from command. This administrative review is known as a "reclama." Ultimately all of Herbert's charges were rejected, and the review denied.

Herbert retired from the Army. With James Wooten, a *New York Times* reporter, he wrote an autobiography called *Soldier* which attacked the Army and its treatment of him. Herbert appeared on numerous television and radio shows to press those charges and publicize his book.

Herbert first met Barry Lando on July 1, 1971. On that date Lando, then a news writer for CBS, interviewed Herbert at a motel in Natural Bridge, Virginia. The interview covered Herbert's background, the mistreatment of Vietnamese prisoners, Herbert's war crime charges, the Army's investigations of them, and Herbert's anticipated retirement from the Army. Herbert impressed Lando favorably. A part of that interview was broadcast on CBS Weekend News on July 7, 1971. Lando kept in touch with Herbert, and met with Herbert and his attorneys on three occasions in Atlanta during February and March 1972. By this time the Army had exonerated Barnes and Franklin of Herbert's charges, and Herbert had left the Army.

In September 1971 Lando had become one of several producers on "60 Minutes," CBS's popular weekly news program. In early March 1972 he recommended to Wallace that the program do a favorable report on Herbert. Wallace disagreed. He considered that "60 Minutes" could not add to the public's knowledge of Herbert, and that the program should not promote him further. Wallace also expressed skepticism of some of Herbert's claims.

Lando persisted. Wallace told him to pursue his inquiries and obtain additional material.

Over the ensuing months, concurrently with other assignments, Lando continued interviewing individuals and examining documents about Herbert. He received considerable cooperation from the Army, stopping short, however, of a release of the Barnes and Franklin investigatory files. All told, in preparation for the program, Lando interviewed more than 120 people and examined thousands of documents. He conferred frequently with Wallace. Lando says (affidavit, ¶ 35) that as the result of his investigation he concluded that the Army's investigations were not a whitewash, and that Herbert had not been relieved of command for trying to report war crimes to his superiors. Those conclusions persuaded Wallace that a segment on Herbert would be sufficiently newsworthy for "60 Minutes." The program was constructed, edited, and aired on February 4, 1973. I will consider it in some detail.

V.

Contents of the Program

As noted, the program aired on Sunday, February 4, 1973. Captioned "The Selling of Col. Herbert," it comprised one of the three 20-minute segments on the "60 Minutes" broadcast that evening. The program consists of edited excerpts of filmed interviews of Herbert and others, interspersed with comments by Wallace. The transcript is in evidence on these motions.

Wallace commences the segment by stating: "One of the sad legacies of our years in Vietnam is the distrust of the American military establishment the war planted in the minds of millions of Americans." Herbert is identified as one who helped to breed that suspicion. Wallace refers to Herbert's book "Soldier" as "a savage indictment of the Pentagon in general and some of its top officers in particular." Wallace identifies one of Herbert's

aims as "proving that his military career was destroyed by the Pentagon only because he tried to report war crimes, atrocities, in Vietnam to his superior officers." Wallace concludes his introduction:

> "60 Minutes set out to investigate the validity of Herbert's allegations. In the course of the last year, producer Barry Lando talked with scores of people in and out of the service—people who have known Herbert and the Army. Here is our report."

The program then displays an excerpt from a prior Dick Cavett interview with Herbert, in which Herbert described the so-called "St. Valentine's Day Massacre" at Cu Loi. Herbert described for Cavett the massacre of Vietnamese civilians by South Vietnamese "national police" acting "under an American's charge." Wallace, resuming, says:

> "As Hebert tells it, then and now, he tried repeatedly to have this and other alleged war crimes investigated by his commanders in Vietnam. As a result, he says, he was relieved of command and had his career ruined by an Army establishment intent on covering up atrocities."

Wallace goes on to describe Herbert's distinguished military record, culminating in his appointment as commander of the Second Battalion of the 173d Airborne Brigade. Wallace says:

> "Again Herbert excelled. In only 58 days he won a Silver Star and three Bronze Stars. But then, abruptly, in April of 1969, he was relieved of command by the same officer who had given it to him, General John Barnes."

The program then focuses upon Barnes, undergoing questioning by Lando and Wallace. Barnes expresses the view that Herbert was "a killer," that he "enjoyed killing," and would cause Barnes trouble in "the pacifica-

tion," although in response to Lando's questions Barnes acknowledged that he had no "hard evidence" to show that Herbert was a "killer," and that Herbert's evident enjoyment in leading squads in the field with a M-16 rifle could "just be a sign of bravery." Barnes also expressed suspicion with Herbert's high body counts. And Barnes added: "I just didn't have confidence in him. I'd lost confidence in him as a comander with the ability to control his people."

These exchanges then occurred. Because of their central significance to the issues I quote them verbatim:

> "LANDO: Did Colonel Herbert ever formally or informally report any war crimes or atrocities to you?
>
> "BARNES: He himself never did to me. Absolutely not. If he had, I would have taken the same action I did when I learned of atrocities anywhere. If they are under my responsibility, I would have court-martialed the man responsible for it, as I told every replacement that came into the brigade.
>
> "WALLACE: General Barnes' deputy commander was Colonel Ross Franklin. It was he who recommended to Barnes that Herbert be relieved. One reason, says Franklin, is that he had come to feel he could not trust Herbert's word.
>
> "FRANKLIN: Tactically, he was the best battalion commander we had. I counseled Herbert several times and once I counseled him on telling the truth or being more exact in what he said. I told him at that time that he could run circles around all the rest of the battalion commanders if he'd just tell the truth.
>
> "WALLACE: Did Colonel Herbert ever report war crimes or atrocities of any nature to you, Colonel Franklin?
>
> "FRANKLIN: No.

"WALLACE: Never?

"FRANKLIN: Never.

"WALLACE: Verbally or in writing?

"FRANKLIN: In no way, either orally or in writing. This—I had many conversations with Colonel Herbert. We discussed many things, but never war crimes."

Wallace resumes the narrative, describing Herbert's unsuccessful effort to obtain redress after losing his command, and the filing of Herbert's court-martial charges against Barnes and Franklin. On the latter point, Wallace says:

"And then in September 1970, 17 months after he had been relieved of command, with the headlines filled with news of the My Lai trials, Colonel Herbert filed his war crimes charges with the Army Inspector General. Six months later, Colonel Herbert went public."

Franklin expresses his inability to understand why Herbert "has come up with totally fictional charges."

Responding to Wallace, Herbert reiterates his claim that he was relieved from command because of his insistence on having war crimes investigated. Wallace then observes that "in almost all the cases" where Herbert claims to have reported war crimes to Franklin or Barnes, it was only Herbert's word against theirs. "So what we decided to do," Wallace says, "was to zero in on the one case where there's a possibility, anyway, of proving who's telling the truth—without relying on your word against their word."

Wallace then summarizes Herbert's account of speaking to Colonel Franklin by radio from the field on February 14, 1969, immediately after the Cu Loi killings, and then flying directly back to "Landing Zone English" later that

day to report the incident personally to Franklin. Franklin then appears on the program to say that on February 14 he was "on R & R" (rest and rehabilitation) in the Ilikai Hotel in Honolulu, Hawaii and did not return to Vietnam until February 16. Herbert says: "If he [Franklin] says he wasn't there, I say he's lying." But Herbert acknowledges he cannot prove it. Wallace says: "60 MINUTES tried to find out who was telling the truth." Wallace then describes inquiries made by the producers at the Ilikai Hotel, leading to a hotel bill and Franklin's cancelled check payable to the hotel, "which means," Wallace states, "that he had to be in Hawaii to pay his bill himself on the 14th of February; therefore could not have been where you said he was on the 14th of February." Wallace also says that the 60 Minutes staff spoke with two Army officers who were in Hawaii at the same time, and who said that they flew back to Vietnam with Colonel Franklin, "taking off from Honolulu late on February 14, arriving at Camranh Bay in Vietnam on February 16, local time." Wallace shows Herbert the hotel bill and Franklin's check, and there is a colloquy about them.

Wallace then states:

> "In his book, Colonel Herbert writes that there are several people who can testify that Franklin was in Vietnam on February the 14th. We asked Herbert for the names of those men. We contacted almost every one of them. None could confirm Herbert's claim. Several men serving under Herbert said they had heard Herbert say, while in Vietnam, that he had reported the February 14 killings, but none were certain that he had actually reported them."

General Barnes materializes at this point to express puzzlement that, during Herbert's three months in Saigon for the Article 138 inquiry, he failed "to jot something down on a piece of paper, to get it notarized." That prompts Wallace to observe to Herbert that Herbert has no documents to show that he "ever reported a war crime

to anybody prior to the time that the My Lai trials were going on at Fort McPherson in Georgia." Herbert debates the documentation issue with Wallace; reiterates that he reported atrocities to Franklin and Barnes; again calls them liars; and again insists that the Army deprived him of his military career because he insisted upon reporting war crimes and the Army wanted them covered up.

Wallace then focuses the audience's attention upon the Longbinh Army base just outside Saigon, where Herbert went to appeal his relief from command—"and also, he says, to present his war crimes charges." Wallace repeats Herbert's charge that Herbert spoke to Colonel John Douglass, a "U.S. military lawyer and judge in the country." Wallace states: "Herbert claims that Douglass listened to his story and then told him he wouldn't touch war crimes charges against a general with a ten-foot pole." Douglass then appears on the program, being interviewed by Wallace. Douglass denies Herbert's account. In substance, Douglass says that Herbert told him he had a complaint about his relief; that Douglass turned Herbert over to his assistant, one Colonel Rector; that Herbert never mentioned war crimes to Douglass; and that Rector never told Douglass that Herbert had mentioned war crimes to him.

Wallace then confronts Herbert with Douglass's account. Herbert says Douglass's account is not true and that he never saw Rector. Wallace states that "60 Minutes" had contracted Colonel Rector, who said that he had spoken with Herbert "at some length" about his relief from command, but that Herbert "never claimed that war crimes had anything to do with it." Wallace expands on that theme:

> "In fact, over the past several months, we have spoken with many men who saw Herbert after his relief in Vietnam. Some are still in the service, some are out. Most of them admire Herbert, yet to a man

> they say that Herbert never once said to them that he had been relieved because he had tried to push war crimes charges."

Shifting gears somewhat, Wallace asks Herbert if Herbert claims that the Army's investigations into the court-martial charges against Barnes and Franklin was a "whitewash." Herbert makes an affirmative response. Wallace asks Herbert if he remembers an attorney by the name of "Ken Rosenbloom." Yes, I do," replies Herbert; "I was the one that put you in contact with him." "Right," Wallace responds. The program then moves to an interview between Wallace and Rosenbloom. Wallace identifies Rosenbloom as a former captain in the Judge Advocate General's corps who handled the Barnes investigation, and is now an assistant district attorney on Long Island. (The correct spelling is "Rosenblum," but in this section of the opinion I will use the version in the program transcript.) Rosenbloom in substance denies that the Barnes investigation was a whitewash. He describes travels "all over the country," "thousands and thousands of pages of transcript," and complete open access to information given by the Army. The ultimate verdict was that the charges against Barnes did not hold water; Rosenbloom described himself as open-minded, with no grudge against the Army, no grudge against Herbert, and no Army career to protect.

Rosenbloom fades from the screen, and Wallace again confronts Herbert. Herbert responds: "Then let them present the statements and the evidence." This is a reference to the fact that the Army has never consented to the release of the Barnes and Franklin investigation files. Herbert also says that another military lawyer, one Dick Heintz, "will verify what we have said." Wallace replies that 60 Minutes contacted "Herbert's military lawyer, Captain Heintz." Wallace continues:

> "He said that, from the few documents he had seen, he suspected the Army was not doing its best to in-

vestigate Herbert's charges. But he said that he could not be at all certain of that until the full investigations are made public."

Wallace moves on to another topic. He says:

"Another thing that we found out checking out Herbert's book: although several men who served with Herbert say it's not so, there are others who claim that Herbert was an officer who could be brutal with captured enemy prisoners himself."

Wallace then turns to Herbert: "You used to have a radioman by the name of Bruce Potter, right?" Herbert acknowledges that he did. The audience then views part of a filmed interview between Potter and Lando. Potter recounts an incident suggesting that Herbert terrorized Vietnamese detainees by making them think he would throw them out of a helicopter. Potter and Lando fade out. Wallace confronts Herbert with the incident. Herbert denies it. Herbert then acknowledges to Wallace that he knew one "Bob Stemmies" (the correct spelling is "Stemme," but I will continue to follow the transcript), a military intelligence sergeant in Vietnam. Wallace advises Herbert that Stemmies had told 60 Minutes that "he was present once with you as a Viet Cong nurse was being interrogated by ARVN troops, being beaten by them to get her to talk, you were there, stood by, did nothing." Herbert denies the incident. Wallace asks Herbert if he remembers a helicopter pilot named Mike Plantz. Herbert says he does not. Wallace tells Herbert that while Plantz was flying a helicopter for Herbert, he saw Herbert beat up a "wood cutter" and also a Viet Cong prisoner brought back to Landing Zone English. Herbert denies that incident: "It's false. It's false."

Wallace then introduces the name of Bill Hill. The following exchange takes place:

"WALLACE: Bill Hill, one of your top company commanders—

"HERBERT: Yes.

"WALLACE: —has told us that Herbert 'is the best battalion commander I've ever had, but for some reason he's become a liar. It's all so much garbage.'

"HERBERT: If he's still in the Army, he will do the same as other officers will do, I'm sure, in order to keep their career going. These men are not going to destroy themselves.

"WALLACE: In other words, he has simply chickened out and is going along with the Army line against Herbert?

"HERBERT: I don't know.

"WALLACE: Well, that's what you're suggesting.

"HERBERT: I don't even know he said it. You're telling me he said it. But I'm sure he did say it if you said he did. I'm telling you, if Bill Hill feels I'm lying, he's entitled to have that opinion, right?"

The program then turns to what one may characterize as the "Grimshaw Confrontation." Wallace introduces the theme: "In checking out Herbert's book, 'Soldier', we found numerous stories that, according to the people mentioned in those stories, are not true." "One such man," Wallace continues, is a Major Jim Grimshaw, who served under Herbert as a company commander in Vietnam. The program pans to Wallace's interview with Grimshaw. Grimshaw denies that he performed a hazardous feat described by Herbert in his book, or that Herbert recommended Grimshaw for the Silver Star for that incident, as Herbert said he did. Wallace asks Grimshaw: "What do you think about Tony Herbert?", tailoring the question to "things of which you have certain knowledge." Grimshaw responds that Herbert "has expanded some of these stories," and that Herbert has "blown it out." Wallace then asks Grimshaw if Grimshaw believes that Herbert was relieved from command "because he wanted to push allegations of war crimes and

atrocities." Grimshaw responds in the negative. Wallace reminds Grimshaw that the interview is taking place in the Pentagon, and asks: "Did anybody here order you to come here and talk to us?" "No," says Grimshaw. Wallace asks Grimshaw: "You're your own man?" Perhaps not surprisingly, Grimshaw replies: "I'm my own man. I like to think I am. I hope I am."

Wallace then faces the cameras and says this:

> "Jim Grimshaw telephoned Colonel Herbert after we had talked to him. Herbert called us with that news and he claimed that Grimshaw told him that he had spoken with us in the Pentagon only under pressure —that his career was on the line. Herbert told us that was the reason that other officers had also come out against him. When we checked with Grimshaw, he denied telling Herbert that. So to settle the argument, we flew Grimshaw and his wife to New York and had them wait outside listening to our interview with Herbert. When Herbert again intimated that Grimshaw had been pressured by the Pentagon to bad-mouth Herbert, we told Herbert that Grimshaw was there."

The program then reverts to Wallace's interview with Herbert. Grimshaw enters, stage right. He and Herbert greet each other. Herbert and Grimshaw, with occasional interjections by Wallace, discuss the accuracy of those incidents in "Soldier" of which Grimshaw had personal knowledge. Grimshaw says: "So, now we're talking three incidents, when you get right down to it," and adds: "I'm telling you two-thirds, then, are not true." Wallace immediately asks Grimshaw if he was under any pressure from the Pentagon or his commanding officer to give Wallace an interview. Grimshaw answers: "No," "Absolutely not," overriding Herbert's statement: "You told me that." "And I wasn't briefed," Grimshaw adds for good measure.

Next, Wallace elicits from Grimshaw an implied criticism that Herbert should have checked out his stories with people whose names appear in the book. Grimshaw says: "Why didn't you call guys like myself or Hill or some of these guys." Herbert expostulates with Grimshaw, but Grimshaw again overrides him:

> "GRIMSHAW: You know, you're making us a public figure—
>
> "HERBERT: Okay, wait a minute, Jim.
>
> "GRIMSHAW: —whether you want—You know, you're trying to do me a very good job and, in a sense, maybe I think it's because of all the problems that occurred and you maybe want to put us in a good light to the American public. But now you've made me a public figure. I can't help it; I have to speak out."

Wallace then describes the generally favorable and uncritical publicity that Herbert had received from the media. Attorney Ken Rosenbloom appears again to express the opinion that "because of the temper of the times and what the country wanted to hear, perhaps, or because the media was looking for another hero, they tended to accept these allegations uncritically." Wallace then draws from Franklin the acknowledgment that Franklin refused to talk to the *New York Times* in Vietnam. At this point, Barnes observes that during the court-martial investigations, the Army's policy was not to put out any statements, so that "the press had no place else to go for information but back to Herbert, where the source was. And I just think that the press did what they could but they weren't given both sides of the stories."

The program concludes with the following:

> "LANDO: Why not make the investigation public, then?

"BARNES: Don't ask me. If I was in charge I would, but I'm not in charge.

"HERBERT: One of the things I have said from the beginning is that you'll never know for sure. No one will know the whole truth until the Army releases for publication every single document and statement they have, which they have not done unless they've let you read them all. And the second portion [sic] is, until they have a full Congressional inquiry to find out is Herbert telling the truth? Is Herbert lying? Is Ross Franklin telling the truth? Is Ross Frankling lying? And lay it all out there for everybody—and I'm sure that's what you're trying to do to some extent tonight and I go along with it.

"WALLACE: Okay.

"The Army could indeed help resolve the controversy. They could open their files to a public airing. They could make themselves available for questioning about the whole Herbert business. But they won't. I asked former Army Chief of Staff William Westmoreland to talk about it. He refused to be interviewed. I asked General Winant Sidle, the Army's Public Information Chief. He refused, too. Why? We heard two lines of speculation among Pentagon people. One is that the Army doesn't want to help make a martyr of Tony Herbert. And the other is that during the various investigations into Herbert's charges, the Army found so many true stores of war crimes that, irrespective of whether Tony Herbert had reported any of them, the Army just doesn't want to wash that kind of dirty linen in the open. Perhaps the best way to stop all speculation is to do what you heard Anthony Herbert and General Barnes suggest a moment ago: make the Army investigations public."

Herbert's statement appearing in this concluding exchange was in fact transposed by CBS, in the editing

process, from the beginning of Wallace's interview with Herbert to the end.

VI

Genesis of the Article

Shortly after the program was aired, Lando began work on an article. Its purposes, according to Lando, were to describe Lando's investigation of Herbert and the preparation of the program; to counter charges Herbert was making against Lando and the program; and to discuss Herbert's ready acceptance of what Lando regarded as the "liberal" press.

Lando sold his article to defendant Atlantic Monthly. Atlantic editors participated in readying the manuscript for publication. The article appeared in the May 1973 issue of the magazine, under the title "The Herbert Affair."

VII.

Contents of the Article

The article runs over nine pages of the magazine. *Atlantic Monthly's* editors composed a preface to Lando's words. That preface, known in the trade as a "streamer," is the first text to appear under the title. It reads as follows:

> "He seemed to be the perfect soldier, a hero in Korea and in Vietnam. Then he was driven out of the Army, his career ruined because he tried to prevent his superiors from concealing war crimes against the Vietnamese. That was the story a television producer persuaded his superiors at CBS should be presented to a nationwide audience. As the producer and his associates began assembling the facts, they found it changing into a very different story, one that left the reporter disillusioned and the hero threatened with decanonization. The producer here

tells how the case unfolded for him, from his first, convincing interviews with Lieutenant Colonel Anthony Herbert, through intensive researching of Herbert's alarming charges against fellow Army officers, to a dramatic confrontation between Herbert and some of those who disputed him on the CBS program, *Sixty Minutes*, shown on February 4 of this year. It is a tangled story, to say the least. One of its lesser anomalies: Herbert's book *Soldier*, now profitably riding the best-seller list, is published by Holt, Rinehart and Winston, which is owned by CBS, the organization that has done the most to attack the book's integrity."

Lando's text then begins. Lando describes his initial interviews with Herbert, the favorable impression Herbert made upon him, and Lando's belief in Herbert's charges against Barnes, Franklin, and the Army. In July and September 1971, Lando notes in the article, Herbert received favorable write-ups in *Life* magazine and the Sunday magazine section of the *New York Times*. That second piece, Lando notes in his *Atlantic Monthly* article, "was written by the *Times* Southern correspondent James T. Wooten. Wooten had covered Herbert since he first made his charges public, and had come to believe fully in the man and most of his claims."

Lando goes on to recount Herbert's appearance on the Dick Cavett Show, and the increasing publicity that Herbert's charges were receiving in the Congress and in the press. Lando describes the responses to the charges that the Army began to make, following the Army's exoneration of General Barnes in October 1971. "Fueled by such information and interviews provided by the Army," Lando writes, "several reporters began to write pieces seriously questioning Herbert's claims." An excerpt from the transcript from the "60 Minutes" broadcast is quoted, setting forth Franklin's denials of reports or conversations with Herbert about war crimes.

In the article Lando recounts his initial enthusiasm for doing a favorable "60 Minutes" segment on Herbert, and Wallace's initial skepticism. Lando describes his ensuing investigation, interspersed with further quotations from the "60 Minutes" transcript. Lando describes interviews, evidence, and evaluations which ultimately persuaded him that Herbert was not truthful.

Lando is also critical in the article of Herbert's book *Soldier*, describing it as "a melange, a kaleidoscope of truth, half-truth, and fabrication." Lando gives examples of these imperfections, as he perceives them. Lando quotes comments made by S.L.A. Marshall in an article Marshall wrote for the *National Review*, which cast doubt on the accuracy of Herbert's prior account of events in Korea. Lando points to discrepancies he perceives in Herbert's ealier book, *Conquest to Nowhere*.

Lando describes Herbert's third appearance on the Dick Cavett Show in January 1973. Herbert referred to Pentagon documents which he said would prove his case; but, Lando observes, Cavett did not ask Herbert to produce them.

In the article Lando expresses surprise that the firm of Holt, Rinehart and Winston, the publishers of *Soldier* (which Herbert wrote with the assistance of Wooten) did not react or contact CBS in any way after the unfavorable "60 Minutes" segment had been aired. Lando writes that when he was preparing the *Atlantic Monthly* article, he called Holt to inquire about the captions to several photographs in *Soldier* which Lando perceived to be inaccurate. Holt editors and officers are quoted as responding, in substance, that they had not checked out the details, although one Holt editor added: "There is no question in our mind about the substantial validity of Tony's story."

The article concludes:

> "What to conclude? I don't pretend to know the motives behind the behavior that has brought Herbert

to national prominence. It seems plain to me that they included a desire to salvage his threatened career and to seek revenge on Colonel Franklin and General Barnes, and that to do so he exploited the issue of war crimes.

"The Army has not released the contents of its investigation into the Herbert affair. The Army is not compelled to do so. There is no recent precedent for such disclosure, though it would presumably go a long way toward clearing the air. The Army, however, may well resist publishing the information because it would include many accounts of atrocities that would further damage the Army's own reputation.

"It is important not to let the vagaries of the Herbert affair obscure the fact that atrocities did occur, before Herbert's eyes and the eyes of countless others. Indeed, the argument can be made that Herbert, whatever his distortions and inventions, is to be thanked for keeping the nation's eyes on the war crimes issue. But I am not comfortable with that argument, because it forgets the responsibility of the press. The press, which long had been negligent about dealing with the question of American war crimes, found in Herbert a heroic figure, a martyr through whom to dramatize the issue. But we bought ourselves a martyr with feet of clay."

Atlantic editors had considerable input with respect to the wording of the concluding paragraph of the article. Robert Manning, then editor-in-chief of the magazine, was particularly involved, conferring with Lando about the wording. The magazine's editors were concerned with summing up and clarifying the themes of the article. While the evidence on certain points is in conflict, a jury could reasonably find that Manning was the first to suggest the phase in the final sentence: "a martyr with feet of clay."

The evidence also shows that at the initiative of Atlantic editors, Lando included in his article the following paragraph:

> "One of the few reviewers to question Herbert's credibility discovered inaccuracies in his account of Korean experiences. S.L.A. Marshall wrote in the *National Review:* 'As for where truth lies in this incident, and the reliability of Mr. Herbert's testament, if his recollection of what happened around Ankhe and Tuyhoa in Vietnam is no better than his recall of experience in Korea, the grading should be zero minus. Having been there at the same time, moving through the same scenes with the same outfits, I say that he dilates expansively on things that never happened.' "

Finally, Atlantic contributed the graphics which accompany the article. These graphics consist of five silhouettes of a helmeted soldier, depicted as if they were targets on a firing range. These illustrations appear on pages 1, 3, 5, 7, and 9 of the article. The last illustration appears underneath the concluding paragraph. As the article progresses, the soldierly silhouette becomes increasingly riddled with bullet holes. There are none in the first illustration; the fifth and last resembles Swiss cheese.

VIII.

"Actual Malice" and Herbert's Claims against Lando, Wallace, and CBS

It is now time to examine in detail those statements in the program and article which plaintiff claims are actionable: that is, statements plaintiff alleges were false, defamatory, and made with knowledge of actual or probable falsity.

On occasion plaintiff's brief lumps all "defendants" together indiscriminately. But there are significant differences in status. Lando was the prime investigator and

architect of the program, and sole author of the article. Wallace did some investigating and contributed to the structure of the program. CBS employed them both. While Atlantic Monthly published Lando's article, it had nothing to do with the program, and did no investigating. Obviously different issues of liability arise. I shall first deal with the charges of actual malice on the part of Lando, Wallace and CBS. Atlantic Monthly will be considered separately.

Much of plaintiff's 282-page brief deals with background material: the perceived predisposition of Lando and Wallace to debunk Herbert; the methodology of the investigation; facts omitted, avenues left unexplored, contradictions ignored. All this plays an admissible and potentially useful role in the analysis of a public figure defamation case. But a time comes, in response to summary judgment motions, when the plaintiff must specifically identify those statements which he says were made with knowledge of actual or probable falsity. He cannot rely on the allegations of his complaint, even those allegations which purport to identify specific false and malicious statements. The legal sufficiency of that pleading brought the defendants into court and required them to answer. Since joinder of issue on the pleadings extensive discovery has been conducted. At the end of that discovery, defendants move for summary judgment. They say, in essence, that some of the contents of the program and article are not defamatory; none of them are false; and in any event no statement was generated by actual malice. Elaborate affidavits and briefs are offered in support of these propositions. In responding, plaintiff must abide by Rule 56(e), F.R.Civ.P.: he "may not rest upon the mere allegations . . . of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

I dwell on these obvious truths at some length because it is not until page 224 of plaintiff's brief that one finds a list of particular, identified statements which plaintiff claims were "false statements known by defendants to be false." There are eleven of them. It is these statements—and these alone—which plaintiff, exhaustive discovery having been accomplished, now puts forward in opposition to summary judgment. In musical terms, what went before is recitative. The aria begins on page 224 of the score.

I will analyze these eleven statements in turn. But I must first consider a footnote which plaintiff drops from the introductory paragraph of his text at p. 224. That footnote reads:

> "In regard to these statements a jury could find defendants did know they were false when published (*see Herbert v. Lando*, 73 F.R.D. at 393). In regard to many other statements the jury could find defendants were aware of their probable falsity (*cf. Gertz*, 418 U.S. at 334, n. 6 [94 S.Ct. at 3004 n. 6]). Because of the overwhelming evidence of defendants' awareness on some of these other statements, plaintiff contends such evidence may also properly support a jury finding of knowledge of falsity. Such other statements are not listed herein, nor has the defamatory impact of the publications in their entirety been addressed here. Also not included herein are published statements of fact which defendants did not know to be the fact (*see, e.g., supra*, pp. 153-156). The making of such statements falls within the area of reckless disregard. *See, Sills v. New York Times*, 8 Med.L.Rptr. at 1463."

With due respect to plaintiff's experienced counsel, I am at a loss to understand what defendants and the Court are to make of such contentions. The assertion that "[i]n regard to many other statements the jury

could find defendants were aware of their probable falsity," standing alone, is no more than bare conclusion. If plaintiff does not specifically identify such statements —and he declines to do so—how are the defendants to reply? In fact, defendants do not respond to this footnote in their reply papers, and one can hardly blame them. Surely defendants are not required to suggest which of their own statements a jury might regard as reckless. And the Court is not about to speculate on the subject.

No. Plaintiff's clear obligation in response to these motions was to identify specifically those statements which he contends a jury could find actionable under the *New York Times v. Sullivan* rule, under either prong of the "actual malice" definition. He undertakes to do so in the eleven instances to which I now turn. I consider no other statements.

In the ensuing sub-sections, I first quote the statement and criticism as set forth in plaintiff's brief, and then analyze the record evidence. The question for decision is whether the particular statement is *actionable*, by which I mean susceptible of imposing liability at the hands of a reasonable jury properly instructed on the law.

(a) On the program, in answer to Lando's question to Barnes whether "Herbert ever formally or informally reported any war crimes or atrocities" to him, Barnes stated, "He himself never did to me. Absolutely not." Lando knew, however, that Herbert had reported POW mistreatment at the An Khe compound to Barnes through his XO, Bethea, who immediately conveyed the information to Barnes.

I accept plaintiff's implicit proposition that if the CBS defendants broadcast Barnes's statement knowing that

it was false or probably false, they would be liable even though Barnes uttered the words. But this statement cannot operate as a vehicle for liability because it does not satisfy the threshold requirement of falsity.

The clear thrust of Barnes's statement is that Herbert never *personally* reported war crimes or atrocities to him. The full exchange follows:

> "LANDO: Did Colonel Herbert ever formally or informally report any war crimes or atrocities to you?
>
> "BARNES: He *himself* never did to me. Absolutely not. If he had, I would have taken the same action I did when I learned of atrocities anywhere. If they are under my responsibility, I would have court-martialed the man responsible for it, as I told every replacement that came into the brigade." (emphasis added).

The existence *vel non* of personal reports by Herbert to Barnes or Franklin was significant because of the strong *ad hominem* attacks made by Herbert upon his two superior officers in *Soldier* and his statements to the media. Pursuing this theme, the program turned immediately from Barnes's denial to a comparable denial by Franklin that Herbert had ever reported war crimes or atrocities to *him*.

Plaintiff says Lando knew Barnes's statement was false because Lando knew "that Herbert had reported POW mistreatment at the An Khe compound to Barnes through his XO [executive officer], Bethea, who immediately conveyed the information to Barnes." But reporting personally to one officer is not the same as reporting personally to another. The element of falsity is lacking. That conclusion is reinforced by Herbert's sworn testimony on November 4, 1970 to an Army CID agent (Eldridge Reply Affidavit, Ex. A):

> "MR. SNYDER [CID agent]: Did you ever personally report any of the aforementioned incidents to BG BARNES, CG, 173d Airborne Brigade?
>
> "LTC HERBERT: No. General BARNES made it known that all reporting would be done through Colonel FRANKLIN, if they were tactical and through the XO, whom he described as 'Chief of Staff', for administrative matters."

On the threshold issue of falsity, Herbert's CID testimony is inconsistent with his litigation position that Barnes's statement—"he [Herbert] himself never did [i.e., reported] to me"—was false.

But even if I were to regard Herbert's report to Bethea as the functional equivalent of a report to Barnes, thereby branding Barnes's statement as false, there is no genuine issue on actual malice.

According to Herbert, the incident in question occurred in early January 1969. Herbert was acting Inspector General ("IG") of the brigade. While at Fort McPherson on November 5, 1970, Herbert gave a statement to the Army CID. He alleged that a master sergeant Booth, assigned to his IG section at An Khe, reported to Herbert that he had witnessed the maltreatment of Vietnamese detainees at a compound by military police. Herbert says he went to the compound, ordered the military police to desist, and called Lt. Colonel John D. Bethea, the brigade executive officer, at brigade headquarters at Bong Son to report the incident. Herbert said Bethea ordered him to come to headquarters. Herbert did so. He handed his notes of the incident to Bethea, and recommended to Bethea that a full scale investigation be made. Herbert's CID statement then says:

> "He told me to wait and he would discuss it with General BARNES. I waited outside of the General's aide's office. I saw BETHEA walk off toward the General's trailer located about 50 yards away. I did

not see him enter the trailer. About 5-10 minutes later BETHEA returned and he told me that I would not conduct an IG investigation that an investigation would be conducted through other than IG channels—and it was no longer my concern."

The CID file (Lubell affidavit, E, G) also contains an undated, unsigned statement from Bethea which plaintiff's brief (at 93) says Bethea "refused to sign on advice of counsel." Bethea's statement corroborates Herbert's telephoned and personal reports to him concerning the An Khe incident, and adds: "I consulted with General BARNES, CG, 173d Abn Bde, concerning the allegation of maltreatment of An Khe and he approved my recommendation of having the matter investigated by an investigations officer." Plaintiff accordingly argues that Bethea, in that statement at least, supported Herbert's claim that Barnes learned of Herbert's An Khe report through Bethea.

However, this material was not available to Lando at the time of the program. It is common ground that the Army CID investigation files were not released by the Army until plaintiff and the CBS defendants forced their partial disclosure in Freedom of Information Act ("FOIA") litigation during pendency of the case at bar. Lubell affidavit at ¶ 40, p. 30. There is no evidence Lando had this information available to him at the time of the program, or the article. Herbert's book *Soldier* did mention Bethea in connection with unrelated incidents, and Lando personally interviewed Bethea about them. But Lando's notes of the interview (PX 109) contain no indication that the An Khe reporting incident was known to Lando or commented upon by Bethea.

There is no basis in the record for a finding of actual malice in respect of Barnes's statement. Accordingly it is not actionaable.

(b) On the program and in the article, in answer to Wallace's questions, Franklin stated that Herbert "never" reported war crimes or atrocities of any nature to him "In no way, either orally or in writing. I had many conversations with Colonel Herbert, we discussed many things but never war crimes." Lando knew, however, that Herbert had discussed the An Khe mistreatment with Franklin and that Franklin conceded Herbert "possibly" discussed with him mistreatment of the Vietnamese by American advisors and ARVN forces.

The discussion in plaintiff's brief about Lando's indicated knowledge (pp. 94-95) shows that the source of that knowledge was testimony Franklin gave at the hearing into Herbert's war crime charges against Barnes. As noted *supra*, this testimony was not available to Lando when he researched and prepared the program, although he had attempted to obtain such material from the Army. Obviously Franklin's testimony at the Barnes investigation is irrelevant to the state of Lando's mind at the time of the program. Plaintiff does not point to any evidence suggesting an earlier acquisition of this information by Lando.

Furthermore, Franklin's account of the An Khe incident at the Barnes hearing was that Herbert recounted to him "something he had seen that was bad." Lubell affidavit, Ex. F, Franklin at 7389. The incident as recalled by Franklin in his testimony involved "MPs . . . putting U.S. Soldiers in a front leaning-rest position." *Id.* at 7389-7390. Even if the Barnes file had been available to Lando—and it was not—there is no evidence that the discussion rose to the level of a report by Herbert to Franklin of a "war crime" or "atrocity." On the contrary: Herbert's detailed charge sheet against Franklin, executed at Fort McPherson on March 15, 1971, which lists Franklin's failures to report or investigate a series of war crimes, makes no mention of the An Khe incident.

There is no proof of actual malice at the time of publication of Franklin's statement in the program or the article. This statement is not actionable.

(c) Wallace stated, "Several men serving under Herbert said they had heard Herbert say, while in Vietnam, that he had reported the February 14 killings, but none were certain that he had actually reported them." In fact, both Lando and Wallace knew that (1) not several, but many men while in Vietnam heard Herbert say he had reported the Cu Loi killings; (2) many men heard, in addition, Herbert's warnings that war crimes and atrocities, like Cu Loi, were absolutely prohibited; (3) several men had not only heard Herbert say he had reported the February 14 murders but several men *themselves* heard or saw Herbert reporting the killings. (emphasis in original).

Wallace made the quoted statement at the time when the program was focusing upon whether or not Herbert personally reported the Cu Loi incident to Franklin in Vietnam on February 14. Just before making the quoted statement, Wallace had confronted Herbert with Franklin's check to the Ilikai Hotel in Hawaii, dated February 14. Herbert responds to that document; and Wallace then makes a series of comments from which the statement presently under consideration is taken. I quote that exchange, emphasizing the words which Herbert contends contain a knowing false statement of fact:

"HERBERT: I can probably find you a hundred checks that I have either dated for another reason, wrote after the fact, misdated, what have you. I don't know. All I know is I saw Ross Franklin there and talked to him. I know that. I know what I saw. I know what I did. And I stick by it and I still say

it. And I swear to it and I've sworn to it under oath and I'll swear to it again, you know?

"WALLACE: In his book, Colonel Herbert writes that there are several people who can testify that Franklin was in Vietnam on February the 14th. We asked Herbert for the names of those men. We contacted almost every one of them. None could confirm Herbert's claim. *Several men serving under Herbert said they had heard Herbert say, while in Vietnam, that he had reported the February 14 killings, but none were certain that he had actually reported them.*"

Plaintiff's brief characterizes the italicized statement as knowingly false on three grounds, which I will consider in turn.

First, it is said that both Lando and Wallace knew that "not several, but many men while in Vietnam heard Herbert say he had reported the Cu Loi killings." This criticism turns on the distinction between "several" (Wallace's word) and "many" (the word preferred by Herbert). The distinction between "several" and "many" has both objective and subjective overtones. A journalist who states that "several" people attended a track meet could be fairly charged with false reporting if he knew that 100,000 fans had filled the stadium. On the other hand, several minutes listening to Beethoven may feel like many minutes in the dentist's chair. Plaintiff's brief (pp. 37-53) discusses the individuals he has in mind in criticizing Wallace's choice of word. In this particular context, I conclude that plaintiff's criticism is nothing more than a quibble.

Secondly, plaintiff argues that both Lando and Wallace knew that "many men heard, in addition, Herbert's warnings that war crimes and atrocities, like Cu Loi, were absolutely prohibited." The difficulty with this criticism is that it has nothing to do with the subject matter of

Wallace's statement. The pertinent portion of the program addressed whether or not Herbert had "actually reported" war crimes or atrocities to his superior officers. Herbert's warnings to his men that war crimes and atrocities were prohibited does not bear on that issue at all.

Finally, plaintiff argues that both Lando and Wallace knew that "several men had not only heard Herbert say he had reported the February 14 murders but several men *themselves* heard or saw Herbert reporting the killings." (emphasis in original). The last phrase of this criticism at least focuses upon the issue raised by Wallace's statement.

The discussion in plaintiff's brief of the pertinent evidence (pp. 37-53) lays stress upon six individuals. I will first consider their evidence, and then the effect of that evidence upon the issue of actual malice.

The first is Sgt. Wallace W. Warden, who at the time of the Cu Loi incident was platoon sergeant of the 1st Platoon of B Company in Herbert's battalion. Lando interviewed Warden at Ft. Benning, Georgia in December, 1972. Warden has submitted an affidavit in opposition to the present motions. In that affidavit he describes his interview by Lando. Lando showed Warden selected portions of Herbert's book *Soldier* and asked Warden if the accounts were accurate. Warden cannot presently remember all the portions Lando asked him about, but he said they were accurate. But Warden does recall that Lando asked him specifically about the incident at Cu Loi. In his present affidavit, Warden says that he described to Lando the capture by his platoon of a number of prisoners. Warden's intent was to take the prisoners back to base. However, South Vietnamese troops arrived, accompanied by an American lieutenant advisor. They took over control of the prisoners, whereupon the South Vietnamese began shooting the prisoners. Warden de-

scribes himself as running to tell Herbert about it, Herbert being "about 3 or 4 minutes behind our platoon." Affidavit at 2. Herbert was very angry, came to the clearing, "screamed at the [American] lieutenant," and told him he wanted no more killing. Warden's affidavit then says:

> "He [Herbert] told me to go to the rear and get the remaining people out of the area and be sure nothing happened to them. He said he was going to call on the radio and he went to the radio and did so. I told Mr. Lando that he was very mad when he went to call on the radio."

Plaintiff's brief (at 39) also refers to a statement given by Warden in November 1970 to the CID that Herbert had seen the four male prisoners on the ground and "he got on the radio and called somebody and reported the incident." That, of course, is a version more helpful to plaintiff on the present issue than what Warden says in his affidavit he told Lando in December of 1972. But it is common ground that Warden's CID statement, AHX 94, was not available to Lando at the time of the program or article, having been obtained by Herbert through FOIA proceedings. Herbert deposition at 2394-95.

The second individual is Larry W. Kahila. Kahila served as a helicopter pilot with the brigade during the pertinent time. He was given an affidavit in opposition to defendants' motion.

In that affidavit Kahila states that during the Cu Loi action, Herbert had three helicopters working with him, one piloted by Kahila. Kahila says that he flew Herbert into the Cu Loi area. Herbert landed, and Kahila flew above the action. After flying around for a time, Kahila landed his aircraft and, according to the affidavit (¶ 3, p. 2), "Colonel Herbert boarded and immediately got on the radio." The affidavit continues:

"I know he was talking to someone at Brigade Headquarters. The radio net was set for Brigade communication. I monitored the beginning of the call and I believe he was talking to Colonel Franklin because he used Colonel Franklin's call sign when he got on the radio. While I can no longer recall at this time what Colonel Franklin's call signal was, I do specifically recall Colonel Herbert using Colonel Franklin's call signal. From what I could hear at the beginning of the conversation, the voice that Colonel Herbert was talking to sounded to me like that of Colonel Franklin. Shortly after Colonel Herbert started to talk, I had to switch off to another net. When Colonel Herbert got on the helicopter and when he was speaking on the radio to the person I believe to have been Colonel Franklin, he was very upset and angry about something that had happened to the prisoners. He ordered me to get him back to Brigade Headquarters as quickly as possible."

Kahila's affidavit also states that as soon as he landed the helicopter at the landing pad at brigade headquarters, "Colonel Herbert jumped out and hurried off to the brigade headquarters building."

Lando interviewed Kahila several times by telephone. In Kahila's affidavit (¶ 10, pp. 6-7), Kahila gives this account of those interviews:

"10. In 1972 and early 1973, I recall speaking to somebody who identified himself as Barry Lando on what I believe are three occasions. All of these discussions were by telephone. I specifically recall telling Mr. Lando that I heard Colonel Herbert call back to Brigade Headquarters on February 14th, that Colonel Herbert was very upset at that time, and that from what I personally heard of the conversation and his use of Colonel Franklin's call sign, I firmly believed Colonel Herbert was speaking to

Colonel Franklin. I also told Mr. Lando about Herbert's comments on the helicopter while heading back to Brigade Headquarters, about getting it straightened out and 'that they could not do that.' I further told Mr. Lando that I left Colonel Herbert off at the Brigade landing pad, that the pilots had subsequently discussed the killings at the mess hall, that Herbert had told people that it was a crime, that it was common knowledge that prisoners had been killed at Cu Loi, and that Colonel Herbert, who was very upset over it, was trying to have something done about it. I also told Mr. Lando about the conversation that Colonel Herbert had with me when he was relieved from command. I further recall telling Mr. Lando that Colonel Herbert said his relief was part of Army politicking resulting from his reporting the Cu Loi killings and Brigade's view that what to do about it had become a problem. While I cannot be certain in which particular conversation I told Mr. Lando of these matters, I specifically remember telling him these things and I believe I mentioned some of them on more than one occasion. I am certain that I mentioned to Mr. Lando my belief that Colonel Herbert spoke to Colonel Franklin on the helicopter radio on February 14 more than once."

The CBS defendants in their reply papers attack the credibility of Kahila's affidavit account of what he told Lando. They base that attack upon seemingly inconsistent prior statements Kahila made to Charles Morgan, Herbert's civil rights lawyer, and upon Lando's handwritten notes of his own interviews with Kahila. Lando discusses Kahila in his affidavit at ¶ 17, pp. 7-8:

"When I had visited Herbert in Atlanta in March, I had listened to and made notes from audio tapes of telephone conversations Herbert and Morgan had with men concerning the St. Valentine's Day Massacre (*ante* par. 9). One of these men, Larry Kahila, was

> Herbert's helicopter pilot on February 14, 1969. Herbert told me, and it was my initial impression from listening to the Kahila tape, that Kahila had overheard Herbert report the killings from his helicopter on the radio on February 14. But after rereading my notes and interviewing Kahila myself, I realized Kahila had not heard the radio call and had no firsthand knowledge. Although he told me that he thought that Herbert had reported the killings, his belief was based upon the fact that he had observed Herbert speaking on the radio on February 14 and that Herbert had subsequently told Kahila he had reported the killings." (footnote omitted).

While challenges to Kahila's credibility would be proper grist for defendants' mill at a trial, I am hardly in a position to hold that a jury could not accept the account of his interviews with Lando that Kahila gives in his affidavit. Defendants' entitlement to summary judgment must therefore turn upon other considerations.

The next individual mentioned in plaintiff's brief (at 41) is Laurence A. Potter. Potter was a lieutenant in the Army Medical Services Corps, assigned to the 173d Airborne Brigade. Potter knew Herbert. He has submitted an affidavit in opposition to the motions. Potter also gave the CID a written statement on November 21, 1970. That statement was not available to defendants at the time of the broadcast. The CID statement describes an incident which resembles Cu Loi. Potter described witnessing Herbert preventing a "National Police Force Unit from shooting some VC prisoners" and Herbert taking control of the prisoners and sending them to Landing Zone English under the control of American troops. Potter was also in a position to testify to Herbert's adverse reaction to the Cu Loi killings and his opposition to prisoner mistreatment. Potter was never interviewed by Lando. It is apparent that he was not in a position to testify concerning the particular point at issue, namely, certain

knowledge that Herbert had reported the Cu Loi incident to his superior officers.

The next individual is Capt. Bill Hill. Hill was one of Herbert's company commanders. Lando interviewed him by telephone in March 1972, taping the conversation. PX 4. By that time, Hill had given statements to the CID. Hill was not personally present at Cu Loi; he monitored the action on his radio. Hill told Lando that: "I'm almost positive I heard a radio transmission" to Franklin. Hill added: "You know, I don't know what he was . . . I only heard the one side. I heard Col. Herbert reporting it." Lando asks: "To somebody higher up?" The following then transpires:

> "A. Yes. And you know the next higher commander is either Gen. Barnes or Col. Franklin.
>
> "Q. So it had to be one of the two.
>
> "A. Yes.
>
> "Q. Would this be talking about the killing of the prisoners?
>
> "A. Yes."

Later in the interview Hill says: "I said I heard it reported to . . . you know, being reported. I couldn't say who it was to."

Several days later Lando spoke to Hill again by telephone. Lando deposition at Tr. 1957. He took notes of that conversation. PX 21. According to those notes, Hill said among other things: "Not sure that Franklin was there on the 14th," and: "Did hear Tony on the radio on reporting superior, doesn't now remember what my statement said/it was not in statement." Lando's reading of his notes at his deposition, Tr. 249.

These initial contacts with Hill led Lando to write a memorandum to Wallace dated March 19, 1972 (PX 10). The introductory paragraphs reflect skepticism on Lando's

part with respect to the Army's denial of Herbert's charges. The memorandum continues:

> "2. The main atrocity Herbert reported was the killing of four Vietnamese POW's and the slitting one of their—a woman's throat. The army admits that most of this—except for the woman—took place. But they say that Col. Franklin denies having had it reported to him, and that he was in Hawaii, in any case at the time—February 14, 1969.
>
> "Over the past week I have talked with officers who say that 1. Franklin was back in Viet Nam, not in Hawaii when that took place; 2. they heard Herbert reporting the case by radio to 'a superior' 3. that the incident was common knowledge throughout the unit. 4. It was also common knowledge that Herbert was trying to get something done about it.
>
> "There are at least two to three instances where Franklin lied during hearings relating to Herbert's appeal; officers also say that Franklin on at least a couple of occasions tried to discredit Herbert, challenging his body counts, trying to get officers under him to challenge Herbert's accounts. Franklin was also suddenly relieved himself from command in Sept. 1970.
>
> "One problem is that the key officer in all of this—who saw Franklin arrive back at his base, and also heard Herbert report in—has been willing to talk to me in confidence—but would not surface publicly. He is afraid. He says he would tell all this under oath in a court room, or pre-trial hearing with lawyer in attendance. He claims he did tell at least some of it to army investigators.
>
> "That kind of evidence alone would seem to be more than enough to move such a case into at least a full pre-trial preceding [sic]. The army never did. Why? They also never questioned another former chopper

> pilot who says Herbert told him he was going to report the case to Franklin, then got on the chopper radio. (He never heard the transmission). But, again, this man was not even questioned by the army."

The "key officer" referred to in the fourth quoted paragraph is Hill. Pursuing his inquiries, Lando interviewed Hill in Oklahoma on December 5, 1972. His notes of that interview are PX 138. Lando showed Hill copies of Herbert's book and asked him to comment. Lando's notes quote Hill: "As best I know H reported it. At least on battalion net I heard someone."

In a later conversation on March, 16, 1973 (see notes, PX 143), Hill said of Franklin: "I didn't say I saw him there. I said I thought he was there. Hell I thought he was, but there was no way to be certain, always running around see him every few days. When I sat down to think about it I couldn't be certain."

In his affidavit at ¶ 18, Lando deals with his interviews with Hill as follows:

> "In early March 1972, Herbert and I had spoken by telephone to Capt. Bill Hill, one of Herbert's company commanders. It was my first impression that Hill was certain Franklin was in Vietnam on February 14 and that Herbert had reported the killings by radio to either Franklin or Barnes on that day. When I called Hill later that month he stated he was not sure Franklin was in Vietnam on February 14, although he still thought that he had heard Herbert report the killings over the radio that day. I told Herbert what Hill had said. Herbert said Hill's uncertainty was rooted in his desire to protect his military career. In July 1972 Herbert told me that Hill had told him he recalled seeing Franklin with a particular Brigade officer on February 14 in Vietnam. After receiving the book in galley form (*ante* par.

14), I called Hill to check out some of Herbert's claims. Hill agreed to see me and I flew to Oklahoma in December to interview him. Hill stated in this and subsequent interviews that neither the Army nor his concern for his military career had influenced his recollection of the events of February 14, 1969. Hill just could not be sure that Herbert had reported to Franklin on February 14. Although he had heard someone mention the killings on the radio, he could not be sure that what he had heard was a report to Brigade headquarters nor could he be sure that the person he heard on the radio was Herbert at all. Hill also denied Herbert's story about his having seen Franklin with a Brigade officer on February 14."

Hill has submitted an affidavit in support of defendants' motion. He states at ¶ 5:

"Regarding the February 14, 1969 incident at Cu Loi, as I told the CID, I did not take part in that operation. I do recall hearing someone say on the radio on February 14, 1969, 'The white mice * are killing them on the beach,' or words to that effect. I do not know on what net I heard this, nor did I hear any response to this radio report. The transcript of my telephone conversation with Herbert and Barry Lando, which conversation took place in or around March, 1972, gives the impression that 1) I definitely heard Herbert reporting the killings to either Col. J. Ross Franklin or Gen. John W. Barnes on the radio on February 14, 1969; and 2) I was sure Franklin was in Vietnam on February 14, 1969. That impression is incorrect. As I pointed out to Barry Lando during my conversations with him in March and December 1972 and January 1973, there was no way I could be certain that: 1) it was Her-

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"* I understand the term 'white mice' to mean the Vietnamese National Police."

bert reporting on the radio on February 14, 1969 and that the radio report was to Franklin or Barnes; and 2) Franklin was in fact in Vietnam on that date.

Plaintiff next discusses a series of statements made by Major Jack Donovan. Donovan was Herbert's battalion intelligence officer. Lando interviewed Donovan in Saigon in January 1973, one month before the program was aired. Lando's affidavit (¶ 21 at p. 10) describes that interview:

> "In a background interview with CBS in Saigon in January 1973, Donovan emphasized that Herbert was a ruthless individual who would not hesitate to lie to preserve his own reputation. He cited Herbert's version of the killings at Cu Loi as an example. According to Donovan, Herbert did not mention any 'atrocities' at Cu Loi until several days after the incident and then only when his body counts were called into question. Donovan also told us that to his knowledge no atrocity report was ever filed. Although Donovan would not consent to a filmed interview, he directed us to his statements which were on file with the Army."

These statements were ones which Donovan gave to the CID. Unlike most of the CID files, Lando was able to obtain Donovan's statements before the program was broadcast. They are in evidence at PX 82, 83 and 84. Read cumulatively, they are bewildering.

Donovan gave his first statement to a CID investigator on December 9, 1970. He stated succinctly that he had no actual knowledge of any war crimes committed during his service in Vietnam, including "mistreatment of detainees"; and that he had never received any information concerning war crimes "from any source that I consider reliable, therefore, I have no hearsay information concerning war crimes to report." PX 82.

A different CID investigator interviewed Donovan on May 16, 1971. On that occasion, Donovan signed a statement (PX 83) which describes Herbert reporting to him the details of the Cu Loi incident immediately after it happened. Herbert and Donovan then went to brigade headquarters. Donovan stated to the CID investigator on May 16, 1971:

> "I do know for certain that LTC HERBERT reported the killing of the six detainees (or approximately six detainees) to COL FRANKLIN but I do not recall if HERBERT reported the incident to FRANKLIN immediately following the combat action. At that time, I was in Brigade Headquarters with LTC HERBERT checking on intelligence information. I was standing about five feet from the location where FRANKLIN and HERBERT were talking when I heard HERBERT tell FRANKLIN about the detainees being lined up and shot by Vietnamese forces. I do not recall HERBERT making mention (illegible). HERBERT was talking directly to FRANKLIN and, in my opinion, FRANKLIN could not help but hear what HERBERT had said. I do not recall FRANKLIN'S response if, in fact, he made a response or reply to the allegation. The information relative to the detainees was part of a continuing conversation between the two and I did not hear a response from FRANKLIN. This conversation took place following the incident, but I cannot say when or how long after the action. Roughly, I would say it was no longer than a month following the action."

This statement, predictably enough, triggered a third interview between the CID and Major Donovan. On June 23, 1971 a third CID investigator asked Donovan to explain the "apparent contradiction" between the two prior statements: the first saying that Donovan had neither seen nor heard of, *inter alia*, mistreatment of detainees, and the second giving full details with respect

to Herbert's report of the Cu Loi killings to Franklin. Donovan thereupon launched into an elaborate explanation and "clarification." Donovan stressed that the conversation he overheard occurred some time after the Cu Loi action. He then says this:

> "The circumstances being that I was at Bdc HQ with LTC HERBERT and LTC HERBERT had entered the S-3 office and I had passed the office and entered the TOC radio complex and was standing 5-10 feet from the wall separating the S-3 office and the TOC. I overheard a conversation taking place between LTC HERBERT and an individual I thought at that time to be COL FRANKLIN. At no time did I hear the individual make any specific statement but just based upon the sound of his voice I deduced it was COL FRANKLIN in the office, although I never specifically saw the individual and only heard a limited amount of the conversation. I was never told by LTC HERBERT that he talked to COL FRANKLIN at that particular time. What I did hear was LTC HERBERT making remarks to the individual about persons being shot on the beach by the National Police at Cu Loi. Prior to this trip to Bdc, LTC HERBERT had been talking extensively about Cu Loi and that people were lined up and killed and that a war crime had been committed. During this particular conversation with the individual, the way in which LTC HERBERT related the individuals being shot was in a form that seemed to me to have been reasonably clear that there was a war crime in a sense that people were lined up and shot, but this was largely due to the fact that I heard LTC HERBERT mention it on several occasions. Thinking back, LTC HERBERT did not make it abundantly clear he was reporting a war crime, but in fact seems to be a reiteration by LTC HERBERT of the facts concerning the accuracy of his body

counts and weapons captured. Prior to this trip, LTC HERBERT'S word was apparently being disputed by Bde concerning the exact results of this contact at Cu Loi. In particular, the advisors to the National Police had disclaimed any weapons being captured and that the body count was exaggerated. In my opinion, the conversation was more of a justification of his report concerning the action at Cu Loi rather than the specific intent of conveying that a war crime had been committed."

This effusion prompted a series of questions by the CID investigator, the first two of which I quote, together with Donovan's answers:

"Q. In your statement of 16 May 71, you indicate that you did not recall the individual's response to LTC HERBERT'S remarks. Did you actually hear anything said by the individual to whom HERBERT was talking?

"A: I heard no specific words that were said by the individual that LTC HERBERT was talking to other than single word acknowledgements of LTC HERBERT'S remarks. The tone of LTC HERBERT'S voice and the manner in general, in which he was speaking seemed typical of most of the conversations he had with COL FRANKLIN. Although I did not pick out any particular words the individual said, and I was in a radio room, it was my impression that this was the sound of COL FRANKLIN'S voice. At no time did I hear any words spoken by the individual in response to statements LTC HERBERT was making.

"Q: Could LTC HERBERT have been talking to someone other than COL FRANKLIN, or are you certain he was talking to FRANKLIN?

"A: No, I cannot be absolutely certain that it was COL FRANKLIN. The tone of the conversation

> seemed to indicate to me that it was COL FRANKLIN in the office. I cannot rule out the possibility that LTC HERBERT was reporting a war crime to COL FRANKLIN. The portion I heard was very brief, and I was not devoting my complete attention to the conversation. Since I cannot say what came before or after what I heard, I cannot say that LTC HERBERT was not making a full report to COL FRANKLIN."

One can almost visualize the CID investigator shaking his head and taking a deep breath. He tried once more:

> "Q: Would you elaborate on why the information concerning the Cu Loi incident is stated much more positively in your statement of 16 May 71 than stated during this interview?
>
> "A. The information I gave in the initial statement was basically true as I believe it to be; however, it did convey a higher degree of certainty than did, in fact, exist. During my interview with the CID agent, this particular area was not probed very deeply and as a consequence there was not sufficient elaboration to place the facts in proper perspective."

The last utterance from Major Donovan in the record is the affidavit he gave to defendants' counsel, submitted in support of the present motions. Donovan's "clarification" consists of denials which are as inconsistent with the second of his three CID statements (PX 83) as was the third of those statements (PX 84).

Of course, all Lando had available prior to the broadcast was his interview with Hill, and the three CID statements. Lando says in his affidavit (¶ 21 at p. 11) that those three statements "taken together were contradictory, vague and ambiguous as to what [Donovan] overheard and to whom Herbert was speaking." That is in my judgment a fair enough assessment. Lando's affidavit describes what he did next:

"Nontheless, I confronted Col. Franklin with Donovan's statements. Franklin reiterated that Herbert never mentioned any killings at Cu Loi to him at any time and pointed out the internal inconsistencies in Donovan's statements. I also questioned Kenneth Rosenblum about the Donovan statements. Rosenblum, a former Army prosecutor who worked on the investigation of Herbert's charges against Gen. Barnes, said that when Donovan was questioned during the investigation he disclaimed overhearing Herbert report the Cu Loi shootings to Franklin. Based upon what Franklin and Rosenblum had told me, the Donovan interview with CBS, as well as my own reading of the statements, I concluded that Donovan's statements were not probative of whether Herbert had reported the St. Valentine's Day Massacre to Franklin."

Finally, plaintiff's brief (at 48-50) describes a conversation which Lando had, after the broadcast but before sending his manuscript to *Atlantic Monthly* with Lt. Col. Ernest Webb. Webb was at the pertinent times the battalion operations officer. Webb told Lando that within 24 hours of the Cu Loi killings, Herbert and Webb told a Major Accousti, a brigade staff officer, about them at brigade headquarters. Of course, in view of the timing of Lando's conversation with Webb, plaintiff's criticism is limited to the article. Plaintiff claims that Lando should have referred to Webb's statement in the article.

The question that arises is whether a reasonable jury could find, upon clear and convincing evidence, that the quoted statement was false, defamatory, and made with actual malice.

The portion of Wallace's statement under attack, in respect of men who had served in Vietnam with Herbert is: "but none were certain that he had actually reported [the February 14 killings]." "None" means "no one;

not one; nobody." *American Heritage Dictionary of the English Language* (1976) at 892. "Certain" means, in the present context: "Established beyond doubt or question; indisputable; confident; assured; positive." *Id.* at 220. The *American Heritage Dictionary* adds this note on usage:

> "*Certain* (adjective) is often preceded by *more* or *most* or terms such as *fairly* and *reasonably*, even though by definition *certain* is seemingly absolute in most of its senses. The following typical example is acceptable on all levels to 83 per cent of the Usage Panel: *Nothing is more certain than an extremist's hatred of compromise.*" *Ibid.* (emphasis in original).

It follows from these accepted meanings that if Lando or Wallace were aware of one—just one—individual who was certain in his mind that Herbert had personally reported the Cu Loi killings to Franklin, either on the day of the action or subsequently, the quoted statement would be actionable. It is the existence of such knowledge on the part of Lando and Wallace that plaintiff alleges in his brief, when he argues that "Lando and Wallace knew that . . . several men *themselves* heard or saw Herbert reporting the killings."

Does the evidence bear out this assertion? We put aside at once the statements of Warden and Laurence Potter that were available to the CBS defendants at the time of the program. (Warden's statement to the CID must be disregarded on the ground of nonavailability.) The closest Warden's affidavit comes to the issue is this statement: "I told Mr. Lando that he [Herbert] was very mad when he went to call on the radio." This does not bear directly upon what Herbert said or who he said it to. As for Potter, his proffered testimony does not touch on the issue at all.

Within the context of the program, we are thus left with Kahila, Hill and Donovan. In Hill and Donovan, we

are confronted with Army officers whose initial statements were relatively helpful to Herbert on the issue, but whose subsequent utterances, proffered as "clarification," represented substantial retreats, backtrackings, and changes. Nor, at least in the case of Donovan, can Lando be fairly accused of leading the witness or failing to report accurately what he said. Donovan's reversal of field in respect of the Cu Loi incident appears from his three earlier CID statements which, while available to Lando before the broadcast, had not been influenced by him in any way.

One may plausibly argue—indeed, Herbert does so—that Hill and Donovan told the truth the first time, and then changed their stories because of Army pressure or concern for their careers. But there is no evidence that Lando knew this to be so. The fact of the matter is that Hill's and Donovan's more recent statements introduced elements of ambiguity and uncertainty into narratives which, in their earlier forms, were more positive. Lando could not disregard these professed uncertainties, even though one might doubt that they were genuine. That is to say: Lando could say in the program that Hill and Donovan were "certain" that Herbert had reported the Cu Loi killings to Franklin or Barnes only if Lando accepted what the witnesses had first said, and disbelieved their more recent utterances. But there was no obligation in law or fact for Lando to make that evaluation. Indeed, had Lando ascribed such certainty to Hill or Donovan in the light of those witnesses' recantations, he could have faced an action for false statement by them. In short: a reasonable jury could not find with convincing clarity that Lando acted with actual malice in disregarding Hill and Donovan as individuals who were "certain" Herbert had reported the Cu Loi incident to Franklin.

This leaves us with Kahila. Viewing the evidence in the light most favorable to plaintiff, on the basis of Kahila's affidavit, the jury could find that Kahila is:

> ". . . *certain* that I mentioned to Mr. Lando my *belief* that Colonel Herbert spoke to Colonel Franklin on the helicopter radio on February 14 more than once." (emphasis added).

Kahila's own choice of words illustrates the difference in concepts, and preserves Wallace's quoted statement from the charge of falsity. There is a difference between "certain" and "believe." I believe that God exists; but, God help me, I am not certain of it. *Cf.* Mark, 9:24. Indeed, this is a distinction plaintiff's brief recognizes. On an unrelated point, plaintiff states (p. 94 n. * * *): "Bethea believed, but could not be certain, that Barnes had merely signed the report and forwarded it to higher headquarters."

As an alternative ground for criticism, Herbert argues that responsible journalism required Lando and Wallace to refer to the Donovan statements in the program. Affidavits are submitted in support of that proposition. For example, Stephan Lesher, a professional writer and reporter, argues in respect of the Donovan statements:

> "Given that a basic issue considered by the '60 Minutes' piece was whether Herbert had reported war crimes to his superiors in the Brigade, there is no way this information could have been properly ignored in the broadcast, and yet no mention of the statements was included."

Omission from the program of reference to the Donovan statements, plaintiff argues in his brief (48), "raises a fundamental question of whether defendants failed to conduct themselves as responsible journalists . . ." But this is beside the point. What the program should or should not have included in the exercise of "responsible journalism" is not an appropriate subject for legal challenge or judicial review. I will accept that the quoted statement would have more fully reflected the fruits of CBS's investigation if it had said something like this:

> "Several men serving under Herbert said that they had heard Herbert say, while in Vietnam, that he had reported the February 14 killings, but none were certain that he had actually reported them, although in one statement a Major Donovan had indicated such certainty before apparently changing his mind in a later statement."

One may sympathize with Herbert's contention that CBS should have said something along these lines. But the decisive fact is that there is no evidence that the statement as phrased was false or made with actual malice.

Finally, Webb's statement to Lando (post-program but pre-article) does not bear on the issue. As noted, Herbert's claim at issue was whether or not he reported the February 14 killings to Franklin. The article's treatment of this dispute appears on p. 78. Lando writes:

> "In *Soldier* Herbert claims there are several people who had seen Franklin in Vietnam on February 14. We asked Herbert for names. Not one of these people, in the Army or out, on the record or off, could back up Herbert's claim."

Lando then discusses Hill as the "key person" involved. Webb's statement was to the effect that, shortly after the incident, Herbert reported it not to Colonel Franklin, but to Major Accousti. That is not inconsistent with Lando's assertion. Compare the analysis of the Barnes-Bethea report under sub-point (a), *supra*.

These statements are not actionable.

I will discuss the next two alleged false statements together. They relate to CBS's investigation into whether or not Herbert reported the Cu Loi killings directly to Franklin *in Vietnam on February 14*. As the previous

discussion has shown, this is a significant bone of contention between the two officers. Herbert insists he did so. Franklin insists he was at a Honolulu hotel on February 14. Lando and Wallace concluded, sensibly enough, that unlike many of the disputes where all they had was one man's word against another's, contemporary documentation might exist to help resolve this particular one. Hence the search for and production of the Ilikai hotel bill and Franklin's cancelled check.

Against that background, Wallace made two statements on the program which plaintiff argues, in the passages from his brief quoted below, constituted knowing defamatory falsehoods:

> "(d) Wallace stated that Franklin's check for his Hawaii hotel room was 'for the exact amount of the hotel bill' (Pr.Tr. 6), while the article stated that the check was made out 'for the exact amount of the final bill, down to the last penny' (Art. p. 77). Both Lando and Wallace knew that Franklin's check was not for the 'exact amount,' but $25 less than the hotel's final bill."
>
> * * * *
>
> "(e) On the program, Wallace stated: 'Checking with the Ilikai Hotel in Hawaii, we found that Colonel and Mrs. Franklin had indeed been registered there from February 7 to late in the afternoon of February 14' (Pr.Tr. 6). CBS knew that the Ilikai records revealed that *either* Col. or Mrs. Franklin left on February 13 or 'early the 14th,' but not which, and Lando considered it a 'toss-up' as to which was the case."

To assist Herbert in resisting summary judgment, these statements, viewed in their surrounding circumstances, must be shown to have been false; defamatory of Herbert; and (with convincing clarity) to have been made by defendants with actual malice.

The point at issue, as Wallace made plain during this segment of the program, was whether or not Franklin was physically present in Vietnam on February 14 to receive the report which Herbert says he made to him. It would be actionable if Wallace and Lando had stated—or had permitted Franklin to state on the program—that Franklin was in Hawaii on February 14, when Wallace and Lando had known that Franklin was not or probably was not there. In those circumstances, such a statement would be false; it would be defamatory of Herbert, within the context of the particular point at issue; and it would have been made with the requisite degree of guilty knowledge.

The two statements targeted by plaintiff do not make that particular statement. Rather, they deal with details of the CBS defendants' inquiries into the hotel documentation.

The first of these is that Franklin's check for his hotel room was "for the exact amount of the hotel bill"—down to the last penny," the article adds—whereas in fact the check was for $25 less than the total.

Herbert's factual criticism is well taken. The hotel bill, PX 26, is in the final amount of $192.94. Colonel Franklin's check dated February 14, 1969 is in the amount of $167.94: $25 less than the total. Furthermore, Lando was aware of the discrepancy, having received both the hotel bill and the cancelled check from Franklin during an interview on December 4, 1972. Lando affidavit at ¶ 19(b), at p. 9.

However, this error is not defamatory of Herbert. It subtracts nothing from the factual thrust of the hotel bill and check, when considered together: namely, that Franklin, having made a payment by check to the Ilikai hotel on February 14, 1969, was in Hawaii on that date and not in Vietnam. The check, as noted, is dated February 14. Its amount, $167.94, was credited to Franklin's ac-

count at the hotel on February 14. If these documents had been fabricated, to portray Franklin as having been in Hawaii on February 14 when in fact he was in Vietnam, the documents and any false statements knowingly based upon them would be defamatory of Herbert in the context of the case. This particular discrepancy is not. I need not determine the reason for the discrepancy—defendants ascribe it to confusion of a $25.00 deposit made by Franklin, plaintiff challenges that explanation. It is sufficient to say that the statement in question is neither defamatory, nor probative of defendants' actual malice on the issue of Franklin's whereabouts on February 14.

The same consideration applies to the second quoted statement concerning Franklin's hotel stay which plaintiff claims to be actionable. Wallace said: "Checking with the Ilikai hotel in Hawaii, we found that Colonel and Mrs. Franklin had indeed been registered there from February 7 to late in the afternoon of February 14." In point of fact, Lando had requested CBS's Honolulu office to conduct a further inquiry at the hotel. In evidence as PX 27 is a letter dated December 8, 1982 from Robert W. Sevey, CBS's vice-president and news director, to Lando. Sevey advises that he checked out the local hotel records of the "three Army officers in question." Those officers were Franklin; Colonel John Nicholson; and Major James Crouch. The latter two officers had told Lando that they had accompanied Franklin on his return flight from Hawaii to Vietnam, leaving Hawaii late in the evening of February 14 and arriving in Vietnam on February 16. Lando affidavit at ¶ 19(a), p.9. As to Franklin, Sevey reported:

> "Col. and Mrs. Franklin checked into the Ilikai on or about February 8, 1969. They were on the special R & R rate of $25.00 a day. On February 14, 1969 the rate was reduced to $10.00, which the hotel says was the single R & R charge. This indicates that one

of them left on the 13th or early the 14th. Hotel records do not reveal which."

At his deposition, Lando testified that the Ilikai hotel had just undergone a change of management. The former manager was Western Hotels. That company advised that the reduction in rate on February 14 could have reflected an early checkout rate, so that both Franklins remained until the 14th.

All of this is said by plaintiff to constitute the malicious publication by the defendants concerned of a defamatory falsehood. The statement, viewed in the light of its attendant circumstances, cannot possibly rise to that level, and no reasonable jury could so find. Lando's deposition by Herbert's counsel on this point (Tr. 344-355) reveals a man unable to fully reconstruct the events from the documents available to him, but certain in his mind that Franklin spent the night of February 13 in Hawaii, and departed for Vietnam or February 14. Indeed, that conclusion would appear to be compelled by the February 14 date on Franklin's check which he signed, and which the hotel credited against his account on that day. A stamped endorsement by the First Hawaiian Bank, Waikiki Branch, is dated February 17, 1969, a date inconsistent with misdating of the check by Franklin. It appears to be common ground that it would be physically impossible for Franklin to be in Hawaii on the morning of February 14 and back at brigade headquarters in Vietnam to receive Herbert's report on the afternoon of the same day, local time. Lando also had available to him the statements of Nicholson and Crouch that they had travelled back from Hawaii with Franklin, arriving in Vietnam on February 16 local time. Plaintiff's brief challenges the credibility of these two officers, but that is not the question: the question is whether the quoted statements in the program are actionable because false, defamatory, and made with actual malice. I conclude as a matter of law that no reasonable jury could so find with

the requisite degree of proof. They accordingly are not actionable.

(f) Lando wrote Bittorie "had no sons" (Art. p. 78). In fact, as Lando was told by Bittorie, he had a son.

This is a reference to a statement Lando made in the *Atlantic Monthly* article. It has no counterpart in the program.

At page 78 of the article, Lando is discussing Herbert's credibility, within the particular context of his reports of war atrocities to Franklin. Lando writes:

> "Herbert had also claimed that one of the brigade's top enlisted men, Sergeant Major John Bittorie, had been listening in an outer office when Herbert reported to Colonel Franklin an incident of water torture. When the Army CID questioned him, Bittorie denied Herbert's claim. Herbert told me the reason was that although Bittorie himself was retired, he still had two sons in the service and had to worry about their careers. But when I flew to Columbus, Georgia, to interview Bittorie, he again denied having overheard any such report. What about his sons who are in the Army? *He had no sons.*" (emphasis added).

Plaintiff submits in opposition to the motion an affidavit executed by Bittorie. Bittorie describes his interview with Lando, which took place in December 1972. The affidavit states in part (p. 2):

> "The 60 Minutes program as aired I considered a hatchet job and false since I was well aware of what I personally had related to Lando. Although I could not support Herbert's war crimes allegations, I did know that I had told Lando that I was the father of both a daughter and a son. I also had told him that

> although that son was not now in the Army he had been previously when I had made the statement concerning his career to Herbert (at the time of my sworn statements)."

I can hardly conclude, on these motions for summary judgment, that if Bittorie repeated that testimony at trial, the jury would reject it. Nothing appears in Lando's reply papers to suggest that Bittorie's account is inherently implausible or unworthy of belief. Lando does not submit a reply affidavit denying that Bittorie told him he had a son serving in the Army at the time of Herbert's conversations with him. And even if Lando had submitted such an affidavit, it would have done no more than create a credibility issue which could not be resolved on summary judgment.

Furthermore, it is clear that if the jury accepts Bittorie's account, it could also find upon clear and convincing evidence that Lando published in the *Atlantic Monthly* a false statement, defamatory to Herbert, and with knowledge of actual falsity. The statement "Bittorie had no sons" is defamatory of Herbert because, in the context in which the statement is made, it accuses Herbert of having lied to Lando.

Lando's reply brief (at 16) argues that "plaintiff does not refute the gravamen of the statement: Bittorie denied hearing Herbert report a water torture to Franklin, and was not under pressure to do so; he only quibbles whether Bittorie had sons." That is not an adequate answer. There were two "gravamens" of the quoted paragraph: a particular one (Herbert did not report water torture to Franklin), and a general one (Herbert tells lies). It is in the latter, discrete context that the statement is defamatory; and a trial jury could find actual malice on the part of Lando with respect to its publication.

This statement is actionable.

(g) Wallace stated, "You have no documents to show, not a piece of paper to show that you ever reported a war crime to anybody prior to the time that the My Lai trials were going on at Fort McPherson, Georgia" (Pr.Tr. 7), while defendants knew that Herbert's report of the An Khe mistreatment, the Arnold Report, and Boyer's statement of September 10, 1969, were all "pieces of paper" which showed Herbert reported a war crime to somebody prior to the My Lai trials.

This statement by Wallace occurred during an exchange on the program that was initiated by a rhetorical question posed by General Barnes. The exchange in its entirety goes like this:

"BARNES: Why didn't he do something that had a date on it that would prove that he did report those things? He had plenty of time to do it. He left the brigade, he was down in Saigon three months where he had this court of inquiry, this Article 138. He had plenty of time to jot something down on a piece of paper, to get it notarized. Why didn't he?

"WALLACE [to Herbert]: You have no documents to show, not a piece of paper to show that you ever reported a war crime to anybody prior to the time that the My Lai trials were going on at Fort McPherson in Georgia. You were in Fort McPherson, Georgia, at the very same time that those My Lai trials were going on and then suddenly you went public.

"HERBERT: Let's say that we—I'm not going to say we don't have documents to show that I reported war crimes in Vietnam. That's not for me to say here. I say that we can prove that I did report them in Vietnam.

"WALLACE: You have documents to prove—

"HERBERT: I'm not going to say we have documents or not. I just say we have statements—sworn statements—and testimony that will prove that I reported war crimes in Vietnam.

"WALLACE: Have you—have you published them in your book?

"HERBERT: I don't think so.

"WALLACE: Why?

"HERBERT: I didn't—I had no reason to. It was already in the paper, other things. I don't know why. I have lawyers, just like you have lawyers. We didn't put everything out we have."

The full exchange makes it clear that Wallace was focusing upon whether or not Herbert could produce from his own files "documents" or a "piece of paper" to show that Herbert had in fact reported war crimes prior to the notorious My Lai trials, then underway at Fort McPherson, to which Herbert had been transferred over a year after he left Vietnam. While Herbert evaded the question when Wallace put it to him on that part of the program which was aired, he had acknowledged the truth of the assertion at another point in his interview with Wallace, which was not aired. It is the practice in preparing such television programs to shoot more interview footage than is actually used. The unused portions are called "outtakes." The transcript of outtakes from the Wallace-Herbert interview is in the record as AX 255. The following exchange appears at p. 15:

"MR. WALLACE: . . . . The fact remains, Col. Herbert, that you never told anybody about this. You never put anything on paper about reporting war crimes until virtually a year and a half after those crimes took place.

"COL. HERBERT: On paper.

"MR. WALLACE: On paper.

"COL. HERBERT: That's true."

Herbert, having acknowledged the truth of the challenged assertion, is in no position to charge Wallace with knowledge of its falsity. The argument in plaintiff's brief relies upon the possible existence of documentary reports in Army files. The first references to some of them came in CID investigation reports which were not available to CBS at the time of the program. In any event, Wallace's statement when viewed in proper context is true, and acknowledged by Herbert to be true. Having obtained that acknowledgement, Wallace cannot be faulted for making use of it in that portion of the program which was aired.

This statement is not actionable.

(h) Wallace stated that Stemme described Herbert as present "as a Viet Cong nurse was being interrogated by ARVN troops, being beaten by them to get her to talk." (Pr.Tr. 12). In fact, Lando knew that was not what Stemme had told him.

This particular statement forms part of an exchange on the program which, for the sake of context and clarity, I will quote at greater length.

Wallace introduces the subject by saying:

> "Another thing we found out checking out Herbert's book: Although several men who served with Herbert say it's not so, there are others who claim that Herbert was an officer who could be brutal with captured enemy prisoners himself."

Colloquy on this subject between Herbert and Wallace ensues. A witness named Bruce Potter appears and gives an account of an incident with which I need not be concerned. The following then transpires:

"WALLACE: All right. All right, now—

"HERBERT: —you know?

"WALLACE: —another man: Bob Stemmies [sic].

"HERBERT: Bob Stemmies?

"WALLACE: Do you know him?

"HERBERT: No, he wasn't—didn't work for me, but I do know him, yes.

"WALLACE: Well, he was a military intelligence sergeant.

"HERBERT: Yes.

"WALLACE: You spoke very highly of him on the Cavett shown back in '71—September.

"HERBERT: Yeah, I spoke—Well, I knew about him as an IG, yes.

"WALLACE: Stemmies told us that he was present once with you as a Viet Cong nurse was being interrogated by ARVN troops, being beaten by them to get her to talk, you were there, stood by, did nothing.

"HERBERT: Well, let me tell you this. As long as I was in Vietnam, my unit never captured a single nurse. And you won't find anything about a nurse in any of our records."

The individual in question was one Robert Stemme, who at the pertinent times served in Vietnam as a special agent, Counterintelligence Section, 172d Military Intelligence Detachment, attached to the 173d Airborne Brigade. In his affidavit (¶¶ 11, 12 at p. 5) Lando gives this account of his interviews of Stemme:

"11. Herbert had referred me to Robert Stemme, a Military Intelligence ('MI') sergeant, as a man who would corroborate his claim of having reported war crimes and been relieved as a result. In fact,

the information I learned from Stemme was staggering.

"Herbert had told me that Stemme had reported mistreatment of prisoners to him. Not only did Stemme deny this, but he told me that Herbert was the last person to whom he would have reported war crimes. Stemme said that Herbert did nothing while South Vietnamese police broke a Vietnamese girl's fingers during an interrogation. He also told me that Herbert was constantly bringing prisoners into the MI compound, insisting they were enemy even though the large majority of these 'prisoners' were innocent civilians. Stemme insisted that Herbert was just not the type of person who would report war crimes. Moreover, he said that his position in the MI would have made him privy to reports of war crimes had Herbert made any. Stemme thought that Herbert had been relieved because the Brigade was implementing the government's pacification program and Herbert was just too 'gung ho.' His view was that Herbert's charges were a reaction to his having been relieved of his command.

"12. Although statements of career officers might be suspect, Stemme had been discharged from the Army by the time I spoke to him. I also found Stemme credible because he was associated with the Vietnam Veterans Against the War, although Stemme was sympathetic to the anti-military position that Herbert was espousing, he thought Herbert's charges were made up out of whole cloth."

Lando's affidavit also recites (¶ 36(c) at p. 19):

"As I mentioned earlier (*ante* par. 11), Stemme had related an incident in which Herbert stood by and did nothing while a Vietnamese female was tortured. Stemme also suggested that I interview Fred Brown, who had served with him in the MI, and

who he said was present during the incident. When I spoke to Brown he confirmed that he was present during the incident related by Stemme."

Lando interviewed Stemme by telephone on three separate occasions. The first took place in mid-March of 1972. Stemme had been discharged from the Army in January 1970. A transcript of the tape of that conversation is in evidence as PX 178. It reads in part (pp. 15-16):

"STEMME: Do you know what Field Force National Police are?

"LANDO: Yeah.

"STEMME: Okay, well the Vietnamese Gestapo, okay. And we were out in the field and we—we accidentally ran into some military aged males, this was a real rarity (indistinct) village, and Herbert sat them down and he was convinced, you know, we had them lined up, he was going down saying and this must be ——S-1 and this is DS 2 and this is DS 3 and this is DS 4. About fifty feet away from that, there was some Vietnamese National Field Force, National Police, ... interrogating a fifteen year old Vietnamese female. Breaking her fingers. And Herbert was right there. And I didn't stop it and he certainly wasn't—

"LANDO: He knew what was going on?

"STEMME: What?

"LANDO: He knew what was going on?

"STEMME: Yeah."

Lando spoke again by telephone to Stemme on December 14, 1972. Lando's handwritten notes are PX 179. The notes include these references:

"—Young girl being interrogated by National Police Field Force/2 guys holding her and they breaking her fingers. Brown there. 2nd Lt. was there. Second Lt. lines up."

This is based on Lando's reading of his notes at his deposition, Tr. 2365. The reference to "Second Lt. lines up" "had some relation to that interrogation that Stemme had said that he had witnessed with Herbert," although Lando had no recollection of what the reference meant specifically. Deposition at 2371-72.

Subsequently Lando spoke again by telephone to Stemme. Lando's notes of the conversation form PX 180. Lando read the pertinent notations into his deposition record at Tr. 2376:

> "A. 'Bob Stemme. We had gone into hamlet with Herbert just south of Tiger Mountains—operation put together on basis of alleged source. And we went over there to look for with one of Herbert's platoon/platoon leader had all people lined up, Fred, my interpreter and Col. Herbert walking around. One of them had that girl. He was behind her holding her and guy in front of her holding arms outstretched, wrist—guy asking questions, breaking fingers/Herbert and I standing not more than 4 or 5 feet away—. . .' " "

As noted in Lando's affidavit, Lando at Stemme's suggestion interviewed one Fred Brown about this incident. Brown had also been attached to the 172d Military Intelligence. He was discharged from the Army in August 1969. Lando interviewed him by telephone on December 14, 1972 and again on February 6, 1973. Lando's notations of these conversations are PX 181 and PX 182. The notes of the December 14, 1972 conversation contain these statements:

> " 'I was E4—I know for fact when we out on operation—joint near the coast, Herbert commanded operation/Herbert interrogation of VC nurse—he told police take her around back of building and interrogate/Bob and I sent out there to observe and bring back prisoners for interrogation/2 days later

> sent back by Vietnamese all beat to hell. Herbert knew this stuff was happening, he standing not 50 feet away/as an officer you don't walk around the corner.' "

See Lando deposition at 2383-84. The notes of the February 6, 1973 conversation say in their entirety: "Fred Brown-confirms that was VC nurse." At his deposition, Lando gave this testimony (Tr. 2401):

> "Q. Did you ask Fred Brown whether he was sure that it was a VC nurse?
>
> "A. I don't recollect what my specific question was to him. I just asked him if he could confirm that it was a VC nurse as he originally stated to me."

Brown has given an affidavit in support of defendants' motion. It reads in pertinent part:

> "As I told Barry Lando in 1972, I was present during an operation Herbert commanded near the coast. A Viet Cong nurse was captured and Herbert told the National Police to take her around the back of the building and interrogate her. It was clear to everyone present that Herbert was turning the nurse over to the National Police with the knowledge that she would be brutalized."

Plaintiff argues in his brief (at pp. 76-82) that there are discrepancies between Stemme's accounts of this incident, as well as between the accounts given by Stemme and Brown; and that Lando should have realized Stemme had reason to dislike Herbert. Herbert also makes the point that Stemme's ten statements to the CID, while containing discussions of other tortures and killings, do not refer to the alleged incident referred to on the program. The CID statements, of course, were not available to CBS at the time of the program. Plaintiff argues in his brief that Lando should have asked Stemme for copies.

While it is true that there are some discrepancies in the details of the several accounts given of this incident by Stemme and by Brown, they do support the main thrust of what Wallace said CBS was told by Stemme: namely, that Herbert was present when a Viet Cong female was being interrogated by South Vietnamese troops, that she was being beaten by those troops, that Herbert was aware of the beating, and did not intervene.

Herbert, as noted, denies that such an incident took place. There is no evidence that the CBS defendants knew that Stemme's account was fabricated. The remaining alternative basis for liability is that the defendants published the account recklessly. In *St. Amant v. Thompson, supra,* the Supreme Court said that "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." 390 U.S. at 732, 88 S.Ct. at 1326. In a footnote the Court cited for that proposition the concurring opinion of Chief Justice Warren in *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 169-170, 87 S.Ct. 1975, 1998-99, 18 L.Ed.2d 1094 (1967). The Chief Justice said at 169, 87 S.Ct. at 1998: "The slipshod and sketchy investigatory techniques employed to check the veracity of the source and the inferences to be drawn from the few facts believed to be true are detailed at length in the opinion of Mr. Justice Harlan." At 388 U.S. 157, 87 S.Ct. at 1992, Justice Harlan observed that the publisher of the defamatory article knew that its sole source, one Burnett, "had been placed on probation in connection with bad check charges, but proceeded to publish the story on the basis of his affidavit without substantial independent support." Other indicia of "slipshod and sketchy investigatory techniques" are recounted at 157-58, 87 S.Ct. at 1992-93.

In the case at bar, assuming *arguendo* that a trial jury accepted Herbert's denials and branded Stemme's

account as false, the jury could not find by clear and convincing evidence that the CBS defendants proceeded recklessly in publishing that account. There was no apparent reason to doubt Stemme's veracity. Indeed, Herbert had himself referred Lando to Stemme. Stemme's account is not inherently implausible or untrustworthy. In its salient features, Brown's account corroborates Stemme more than it contradicts him.

This statement is not actionable.

(i) Wallace stated: "We have spoken with many men who saw Herbert after his relief in Vietnam . . . to a man they say that Herbert never once said to them that he had been relieved because he had tried to push war crimes charges" (Pr.Tr. 9). Lando had been told, in words or substance, the exact opposite by at least three men whom he spoke to whom [sic] had seen Herbert after his relief.

This statement by Wallace followed immediately upon Wallace's exchange with Herbert about whether or not Herbert was referred to Colonel Rector by by Colonel Douglass after Herbert had been relieved of his command. Herbert says that he never saw Rector. Wallace then says this (the allegedly false and defamatory statement being italicized):

"Okay.

"But when 60 MINUTES contacted Colonel Rector, he said that he had indeed spoken with Colonel Herbert at some length about his relief from command, but that Herbert never claimed that war crimes had anything to do with it.

"In fact, over the past several months, we have spoken with many men who saw Herbert after his

> relief in Vietnam. Some are still in the service, some are out. Most of them admire Herbert, *yet to a man they say that Herbert never once said to them that he had been relieved because he had tried to push war crimes charges.*"

What Wallace is clearly focusing upon is whether or not Herbert ascribed his relief from command to his war crimes charges shortly after his relief, while Herbert was still in Vietnam. As noted, one of the thrusts of the program was that Herbert did not begin to mention his war crimes charges as a reason for relief from command until he had arrived at Fort McPherson, over a year later.

Having stated: "we have spoken with many men who saw Herbert after his relief in Vietnam," Wallace adds the allegedly false and defamatory assertion: "to a man they say that Herbert never once said to them that he had been relieved because he had tried to push war crimes charges." The phrase "to a man" admits of no exceptions. It is a false, and, in context, defamatory if in fact one individual told Lando that while Herbert was still in Vietnam, Herbert expressed to that individual a belief that his pushing war crimes charges caused him to lose his command.

Plaintiff charges in his brief that "Lando had been told, in words or substance, the exact opposite by at least three men whom he spoke to whom [sic] had seen Herbert after his relief." The relevant argument in the brief (at 153-56) mentions three individuals: Kahila, Moore, and Beamer. I need not dwell upon Moore or Beamer because, as plaintiff's own discussion reveals, whatever Herbert said to these individuals on the subject occurred after he had returned to the United States from Vietnam.

That leaves us with Kahila, the helicopter pilot. As noted *supra*, Kahila has given an affidavit in opposition to the present motions. In that affidavit, Kahila says at ¶ 7, pp. 3-4:

> "7. I flew Colonel Herbert to An Khe when he was relieved from command. I specifically recall his sitting on the landing pad and talking to me. He mentioned reporting the killing of the prisoners at Cu Loi action to Colonel Franklin and said that he had become a problem because there was a lot of Army politics as to whether anything should be done about it. He said that he thought that this Army politicking was why he was relieved from command."

In ¶ 10 of his affidavit, Kahila describes his interviews with Lando. He says:

> "I also told Mr. Lando about the conversation that Colonel Herbert had with me when he was relieved from command. I further recall telling Mr. Lando that Colonel Herbert said his relief was part of Army politicking resulting from his reporting the killings and Brigade's view that what to do about it had become a problem."

The CBS defendants argue in their reply papers (Eldridge affidavit at ¶ 18) that Kahila's present claim—that he told Lando that Herbert said on the day of his relief that this relief was due to Army politicking over what to do about the Cu Loi killings—should be disbelieved because inconsistent with prior statements made by Kahila to Morgan and to Lando. Those inconsistencies are arguable; although Lando's hand-written notes of what Kahila said to him are not necessarily inconsistent with Kahila's present account. PX 48 includes Lando's notes of a telephone interview with Kahila on January 10, 1973. Lando interpreted them for the record at his deposition at Tr. 637-38. Kahila describes the Cu Loi incident and his observations about whether or not Herbert reported it. The notes then read:

"Herbert told me he had reported not that night/day. We flew him out of there and on Ah Khe/I think he mentioned it then/he called it Army politics."

Lando was questioned by plaintiff's counsel about these rather cryptic notations. He testified as follows (Tr. 643-44):

"Q. The next line says, 'Not that night/day we flew him out of there to An Khe.'

"Did Kahili [sic] tell you that he was the pilot who flew Herbert to An Khe when Herbert was relieved of his command?

"A. From these notes I can't tell if Kahili is telling me there he was the pilot or if he was along on the flight.

"Q. In any event, he did tell you he was along on the flight?

"A. Yes.

"Q. Did he tell you it was at that time that Herbert talked about reporting the war crimes or reporting the February 14th events?

"A. What Kahili said, he said, 'I think he mentioned it then.'

"Q. Did Herbert declare that reporting of those war crimes or the February 14th events part of Army politicking?

"A. No, I don't think so. I think this right here refers to why Kahili—or why Herbert had told Kahili he had been relieved of command. In other words, Army politics.

"Q. When Kahili told you he thought Herbert mentioned reporting February 14th events on the flight down to An Khe did you ask Kahili whether Herbert said that was one of the reasons Herbert said he was being relieved of command?

"A. From these notes I can't tell but I think when he said he called it Army politics I'm pretty sure

that came after my question of did Herbert say why he had been relieved of command."

This testimony is not entirely clear. Lando appears to recall Kahila telling him that Herbert mentioned war crimes or reporting the February 14th events on the flight from An Khe, but not that Kahila understood Herbert to be including those subjects as a component part of "Army politics."

There is thus a dispute, turning in significant measure upon issues of credibility, about what Kahila said to Lando on this particular subject. I do not propose to resolve that issue on a motion for summary judgment. Defendants' counsel argues in his reply affidavit (¶ 18): "Kahila's current statements cannot create an issue as to what defendants knew ten years ago." That misses the point. The significant date is not the post-program date of Kahila's affidavit, but the pre-program dates of Kahila's interviews with Lando. Kahila says that on the flight from An Khe Herbert complained of "Army politics" as the reason for his relief from command. Lando acknowledges that Kahila quoted to him Herbert's reference to "Army politics." The dispute is whether, in his interview with Lando, Kahila quoted Herbert in substance as saying that the "Army politics" related to and were triggered by Herbert's report of the Cu Loi killings to Colonel Franklin. That is precisely what Kahila says he told Lando. If a jury accepts such testimony and rejects Lando's contentions that either Kahila did not say that or Lando innocently misunderstood him, then a trial jury could find with the requisite degree of certainty that the quoted statement was false, defamatory, and made with actual malice.

This statement is actionable.

(j) The article stated: "It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes" (Art. p. 79). Lando knew from numerous people he spoke to that Herbert talked in Vietnam about the war crimes and having reported them and that he had been seen or heard talking about the Cu Loi murders on the radio and at Brigade Headquarters.

While defendants do not make this particular argument, I conclude that the quoted statement, viewed in context, is one of opinion rather than a representation of fact. As such, it enjoys absolute First Amendment protection, and consequently is not actionable.

As Lando pressed his inquiries, interviewing first Herbert and then others, and collecting and examining documents, a central dispute emerged as to whether or not Herbert had reported war crimes prior to his transfer to Fort McPherson, Georgia. As has been observed *supra* in connection with othe challenged statements, it was not until Herbert arrived at Fort McPherson that he preferred and filed with the Army formal written charges alleging war crimes and atrocities by elements of the 173a Airborne Brigade, as well as charges against Franklin and Barnes for failing to investigate or report them. The two paragraphs in the *Atlantic Monthly* article preceding the quoted statement (which appears on p. 79) make the points that there was no mention by Herbert of war crimes in the transcript of the Article 138 inquiry into his relief from command; and that the statements Herbert obtained from witnesses while he was at Fort Leavenworth after leaving Vietnam praise him as a commander and as such were useful in Herbert's appeal from his unfavorable efficiency report; "but there is not a word relating to war crimes." The challenged sentence then follows immediately.

Lando's affidavit (at ¶¶ 26-30) makes it clear that during the course of his inquiries, he reached the conclusion that Herbert's war crimes charges, formally asserted at Fort McPherson, were defensive afterthoughts, and that Herbert had not mentioned war crimes while still in Vietnam. Lando lists in his affidavit the reasons why he reached that conclusion: the specific denials of Colonel Douglass and Colonel Rector, Judge Advocates at Saigon, that Herbert identified his war crime reports as the reason for his relief from command; the absence of any reference in the Article 138 proceedings of war crimes, and the denial of officers and attorneys concerned that Herbert was prevented from raising the subject, as Herbert claimed; Herbert's conceded inability to produce copies of any documentary war crimes charges until the filing of charges at Fort McPherson; and other factors.

Herbert argues in his brief (at 50-53) that various individuals told Lando that Herbert had referred to war crimes and atrocities while still in Vietnam, that atrocity incidents were "common knowledge," and that Herbert had been heard at brigade headquarters discussing the subject on various occasions. From this evidence, Herbert argues that Lando acted with actual malice in making the false and defamatory statement that it is only after Herbert's transfer to Fort McPherson that "there is any solid indication he was thinking about reporting war crimes."

To be actionable in a public figure defamation case, assertions must be construed in context "as representations of fact," as opposed to editorial opinions. *Loeb v. New Times Communications Corp., supra,* at 497 F.Supp. 90-91. As Judge Brieant observed in *Reliance Insurance Co. v. Barson's, supra,* at 442 F.Supp. 1350, what is actionable is "misquotation or falsification of a hard fact (as distinguished from an opinion) . . ."

If Lando had written that it was only after Herbert was transferred to Fort McPherson "that there is *any* indication he was thinking about reporting war crimes," plaintiff's allegation of falsity might be arguable. But Lando did not say that. He said instead that only at such time was there "any *solid* indication" (emphasis added). In context, the adjective means "Sound; reliable; concrete: *solid facts.*" *The American Heritage Dictionary of the English Language* (1976) at 1229 (emphasis in original). Lando, in the quoted assertion, is expressing his person evaluation of the evidence revealed by his inquiries. His statement concedes by implication the existence of some indications of an earlier concern on Herbert's part; but in view of the indications pointing the other way (which cannot be dismissed as inherently implausible, although Herbert argues against them), Lando formed the opinion that the earlier indications were neither sound nor reliable—hence not "solid." This is an opinion which the First Amendment entitles Lando to hold and to express without challenge in a court of law.

This statement is not actionable.

(k) Lando wrote that Wooten has come to believe in "most of [Herbert's] claims" (Art. p. 74) when Wooten never limited his belief in Herbert.

The challenged statement is taken from a paragraph in the *Atlantic Monthly* article which appears at p. 74. That paragraph reads in full:

> "In a July, 1971, interview in *Life* magazine, Herbert suggested that war crimes might stop 'if we'd hang a couple of senior commanders.' In September came his big breakthrough: a lengthy article ('How a Supersoldier Was Fired From His Command') in the Sunday magazine section of the New York *Times*. The piece was written by the *Times* Southern cor-

> respondent James T. Wooten. Wooten had covered Herbert since he first made his charges public, and had come to believe fully in the man and most of his claims."

Subsequently Wooten co-authored the book *Soldier* with Herbert. Lando points that out in the next paragraph in the article, which reads in part:

> "At the time, and for months after, I thought Wooten's article to be an excellent description of Herbert and his case. Unlike several reporters who became suspicious of Herbert soon after they started checking into him, I didn't develop doubts until after several weeks of research. Wooten, who later collaborated with Herbert on his book, *Soldier*, today says he still believes in Herbert."

Herbert challenges as false, defamatory and malicious the statement that Wooten "had come to believe fully in [Herbert] and *most* of his claim" (emphasis added). Plaintiff's brief argues that "Wooten never limited his belief in Herbert." I take that to be an assertion that, in truth, Wooten believed in all of Herbert's claim. The CBS defendants say: "Wooten swore that Lando's recitation of his statements is accurate." Reply brief at 18. The only evidence to which I am cited by the parties is Wooten's deposition. However, Lando does say in his deposition at ¶ 49, p. 26:

> "In preparation for the article I did additional research and investigation. In light of my particular interest in exploring the media's handling of Herbert, I spoke to several journalists who had investigated Herbert's claims. I also interviewed the editors at Holt, Rinehart and Winston who had worked on *Soldier*, and I spoke to Wooten a number of times to make sure the article accurately captured his perspective and beliefs as well as those of Herbert's publisher."

Lando and Wooten had discussed Herbert before the program was aired, and Wooten also had a telephone conversation with Wallace. Wooten described one conversation he had with Lando in Washington in December of 1972. Wooten viewed his relationship with Herbert at the time as "that of a reporter, who was writing about him and his case for the New York Times." Tr. 106-07. At that conversation, Lando expressed skepticism about Herbert's story, and Wooten responded that he was not surprised that the Army was attacking Herbert's veracity. That was because, in Wooten's view:

> "The United States Army is not an institution that, to my knowledge, readily or ever admits fault institutionally, and if there is fault, in any given relationship, incident, etc., it is never the Army's institutionally. It is always someone else's." Tr. 109.

In a pre-program telephone conversation with Wallace, Wooten described Wallace's questions as being "negative" and with "a hostile edge to them." Tr. 115. The possibility of Wooten appearing on the 60 Minutes segment was discussed, but that never came to pass.

After the program, Lando began preparation of his magazine article. In the course of that preparation he telephoned Wooten on more than one occasion. I will quote Wooten's deposition testimony that bears upon the present claim:

> "Q. Did you tell Barry in his conversation you no longer knew what to think about Herbert?
>
> "A. No.
>
> "Q. Did you ever tell Barry that?
>
> "A. No. That subject came up in connection with the article, and I am told he said that on television, but I am not sure. That's what I was told. I don't remember by whom. He called me and wanted to know —he was going over quotes from me for the Atlanta

[sic] article, and I think after that—I think there were others, too, but I never told him that.

"I think I may have said something to the effect that I realize that in a situation like this it is difficult to know who to believe, but this is a kind of story that really tests your instincts of who is telling the truth, or something of that nature, but I never told him that.

"I told him that, that day, when he called me to check that quote.

"Q. This is at a later period of time?

"A. Yes. We're talking about—Barry called me later, and I don't really know quite when to see if—to go over quotes with me, but I—things I had said, things that—he used that with me, and said, 'Can I use that'.

"I asked him, because of—I was in a rather sensitive position being a New York Times reporter, and I asked him as a favor if he was going to quote me—to tell me what he was going to quote, and see if I really said that. To call me back, and he did.

"He didn't use it in the article, which I anticipated, and which is what I would have done and what he did."

* * * *

"Q. When Barry spoke to you on the phone were you aware, prior to the conversation that he was writing an article about Herbert, at the time of his calling you?

"A. Yes, I know what you mean. I would assume so, yes. Yes, I guess so, because I was aware of the function of that call was to—as I said to ascertain whether he had my permission to say that I said that I said this and that, so I would assume I knew he was writing an article."

* * * *

"Q. Other than what you testified to, can you recall discussing anything else in this telephone conversa- with Barry Lando in which he went over with you the advance and other areas you've mentioned?

"A. I don't recall. I do not recall anything specifically.

"Q. Did he tell you he would put in the article that you believed in Herbert?

"A. That rings a bell, yes. I may have even asked that he—if he found a way to do that. I may have even asked that he do that."

* * * *

"Q. Did Barry tell you he would put in the article what you thought about Herbert?

"A. Specifically that I still believe in him? I don't recall that he said he would. My impression is that, yes, he said he would."

* * * *

"Q. Did you receive a copy of the Atlantic Monthly article prior to its being published?

"A. I did not, but I don't believe that I—one was actually sent to me. I did see it prior to its publication, and I believe it was provided for me, to me by either Mr. McCauley [Herbert's literary agent] or Mr. Morgan [Herbert's attorney] or both at the same time.

"Q. When McCauley or Morgan showed it to you was that prior to its being published in the—

"A. I believe so, yes.

"Q. And was this a meeting—the occasion of Morgan or McCauley showing it to you?

"A. It was not a meeting specifically for that purpose. I believe it took place in Long Boat Key, Flor-

ida, where the three of us and others had gathered to participate in Spring training with the Pittsburgh Pirates—middle age men gone senile.

"And we were all there and I believe that is—I believe it was at that time and that place that I saw the article, which was before it was published.

"Q. Did you have any discussion with Morgan or McCauley about the article at the time you saw it?

"A. I think we discussed whether or not—this is very vague in my mind, but I think we discussed the idea of whether we ought to—one of us, three of us or Col. Herbert—may have been Atlantic—I don't know if Atlantic had offered or if they were talking about demanding that we be allowed to respond, we being Col. Herbert, to Barry's piece in the same issue.

"I think there was some discussion of that among the three of us, and some debate back and forth as to whether—I am sorry I am vague—as to whether there was an offer or if this was simply an idea that had its origin in that meeting.

"Q. Did you say to McCauley or Morgan in words or substance that one shouldn't pay too much attention to the article?

"A. I may have said something like that. What I recall my position was, on the question of whether or not we should try to respond, my position in this debate or discussion, whatever it was, that no, don't respond to it.

"So I may have said something—don't—what you said—which was, don't pay too much attention. I may have said exactly that, but I don't recall saying exactly that.

"Q. Do you recall what McCauley said?

"A. No, I don't. I really don't.

"Q. Did you discuss with McCauley or Morgan in this conversation inaccuracies in this article?

"A. I don't recall, I assume that we did.

"Q. Did you tell Morgan or McCauley in this conversation that you had spoken to Barry in connection with the article?

"A. Did I tell them down in Florida that I had spoken?

"Q. Yes.

"A. I told them down there, I think, I certainly would have told them at one point if the subject had come up. I don't recall specifically.

"Q. Was the information you had discussed with Barry in your telephone conversation concerning the article, accurately reported in the article?

"A. As I recall I believe so. You mean regarding the details of the contract with Holt for the book? I think so. As I recall, I—

"Q. Regarding your position concerning Col. Herbert?

"A. I think so. It has been some time since I read the Atlantic article, but I believe so."

* * * *

"Q. You testified before that you thought the information you discussed with Barry in connection with the article was accurately reported in the article, and I would like you to look at the article, which you said you hadn't read in a while, and tell me if that is so.

"A. On page 74 of the article there is—the following line—"The piece was written by the Times Southern correspondent, James T. Wooten. Wooten has covered Herbert since he first made his charts public, and has come to believe fully in the man and most of his claim [sic]."

> "I am not going to argue with the reporting of that, but at the same time, it suggests that there are claims he had made, that I do not believe in and I am not aware of any claims that he's made that I don't believe in, so I don't find that to be distorted, inaccurate."

Tr. 111-13; 129-35; 138-39.

On this evidence, which is all that is offered, no reasonable jury could find with convincing clarity that Lando knowingly included in his article a false description of Wooten's state of mind about Herbert.

Preliminarily, it is clear from the article, viewed in the light of Wooten's testimony, that the challenged phrase—Wooten had come to believe in "most of [Herbert's] claims"—is a statement of Landon's perception of the state of Wooten's mind. The phrase does not purport to be a direct quotation from Wooten. As Wooten's testimony shows, during preparation of the article Lando was careful to check with Wooten the accuracy of possible quotations from him. The evidence reveals that on at least one occasion, when Wooten did not accept the quotation—that he "no longer knew what to think about Herbert"—Lando did not use the quotation in the article, for which Wooten was duly appreciative. When Lando is actually quoting Wooten, he says so, as in the statement in the article (favorable to Herbert): "Wooten, who later collaborated with Herbert on his book, *Soldier*, todays say he still believes in Herbert." That quotation, Wooten's testimony shows, Lando included in the article at Wooten's particular request.

I appreciate that Wooten at his deposition picked up on the suggestion in the statement "that there are claims he had made that I do not believe in and I am not aware of any claims that he's made that I don't believe in . . ." That is, of course, the negative pregnant that underlies the present claim. But Wooten was hardly outraged by

it; "I am not going to argue with the reporting of that," he said, and testified in general that the substance of his telephone conversations with Lando about the article were accurately reported. Furthermore, when McCauley, Morgan and Wooten (Herbert partisans all) discussed the Atlantic article after it had appeared, it was Wooten's recommendation to make no response to it, to not pay too much attention. This is not the reaction of a journalist who considers that he has been substantially misquoted.

Viewed in context, the challenged statement represents Lando's evaluation of Wooten's attitude towards Herbert. There is no evidence that Lando did not arrive at that evaluation in good faith. There is no evidence that Lando fabricated a quotation from Wooten, or deliberately distorted anything that Wooten said to him. No reasonable jury could find actual malice in these circumstances.

Finally, I conclude as a matter of law that these particular words, when viewed in context, are not "reasonably susceptible of a defamatory connotation," that being a question for the Court and not the jury. *Ladany v. William Morrow & Co., Inc.*, 465 F.Supp. 870, 871-72 (S.D.N.Y. 1978) (citing and quoting New York cases). The allegedly offending phrase—that when he wrote his New York Times article about Herbert, Wooten "had come to believe fully in the man and most of his claims" —is followed in the next paragraph by the quotation from Wooten that "today . . . he still believes in Herbert." Read together, these statements constitute a vote of confidence, not condemnation.

This statement is not actionable.

I need not and do not deal with every issue raised by the parties' comprehensive papers on the subject of actual malice. But I will comment on two related aspects

of the case, upon which plaintiff places an entirely understandable emphasis. The first is what plaintiff characterizes as the "predetermined portrayal" of his acts and character. The other is what he terms Lando's "hostility" towards him.

It is not really disputed by the CBS defendants that when Lando first aproached Wallace with a suggestion that "60 Minutes" present a favorable treatment of Herbert and his charges against the Army, Wallace discouraged him. In Wallace's view, sufficient had been said in the media in praise of Herbert; Wallace made it clear to Lando that "60 Minutes" would be interested only if an investigation turned up unfavorable information about Herbert. Lando withdrew from the executive suite and dug further.

This editorial decision is undoubtedly galling to Herbert. But it is an ancient journalistic truth that bad or unpleasant news is often more exiciting (or "newsworthy") than good or complimentary news. No doubt those concerned with "60 Minutes" regard themselves as "investigative reporters." That is the current parlance of journalistic chic, having achieved a particular prominence during Watergate. But it is a reportorial phenomenon that was recognized at least as early as the turn of the century. "Investigative reporters" were in those earlier days called "muckrakers." In a speech in 1906, President Theodore Roosevelt borrowed that name from John Bunyan's 17th century Puritan allegory *Pilgrim's Progress.* Bunyan wrote of a man "with the Muck-rake in his hand," who would rather rake filth than look upward to nobler things. Roosevelt said: "Men with the muck-rakes are often indispensible to the well-being of society; but only if they know when to stop raking the muck." American muckrakers of distinction include Lincoln Steffens, Ida Tarbell, Ray Stannard Baker, and the novelist Upton Sinclair. Ralph Nader's *Unsafe at Any Speed* (1965), an example of more recent

"muckraking," forced reforms on the automobile industry.[1] In *Curtis Publishing Co. v. Butts, supra*, Chief Justice Warren took a less charitable view of the *Saturday Evening Post's* declared policy of "sophisticated muckraking," appending the following footnote at 388 U.S. 169, 87 S.Ct. at 1998:

> "Webster's New International Dictionary (2d ed., unabr.), p. 1606, reports the source of the term 'muckrake' as follows:
>
> " 'On April 14, 1906, President Roosevelt delivered a speech in which he used the term *muckrake* in attacking the practice of making sweeping and unjust charges of corruption against public men and corporations. . . .'
>
> "Roget's International Thesaurus § 934(3) lists the following as synonyms: muckrake, throw mud at, throw or fling dirt at, drag through the mud and bespatter."

Pursuing their particular passions, the muckrakers of yesterday and investigative reporters of today have logical publishing preferences. The muckraker who rakes no muck is boring. The investigative reporter whose investigations unearth nothing but purity and virtue, instead of corruption and vice, is not going to get as many published stories appearing under his by-line as his colleague with a keener nose for fools and knaves in high places. It is a melancholy but accurate reflection upon the public taste that vice is more interesting than virtue. Wallace's editorial preference for "60 Minutes" reflects that truth. It does not constitute actual malice for First Amendment purposes.

The objects of self-appointed muckrakers' or investigative reporters' interest seldom welcome their attentions.

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[1] Much of this discussion is derived from Chalmers, David M., *The Muckrake Years* (Van Nostrand-Reinhold 1974).

That investigative reporters are capable of excesses no objective observer of the media would deny. But in a free country, a free press guarantees our freedoms by casting a cold and critical eye upon the performance and pretensions of those who aspire to or hold public office, or for other purposes seek public attention. The First Amendment ensures full, vigorous, uninhibited, fearless —in short, *free*—discussion, be it praise or criticism, of public figures, without the intimidating risk of libel suits. Whether public figures like it or not, the First Amendment sanctions all the news that is constitutionally fit to print. But the Constitution does not protect publication of known or probable falsehood. That news is unfit to print. If also defamatory, it is actionable.

The same considerations apply to the hostility and distrust towards Herbert which Lando manifestly developed during the course of his investigation. Lando did not start out that way: there is no reason to doubt his assertion that Herbert favorably impressed him in their initial contacts, or that Lando first visualized the "60 Minutes" segment as pro-Herbert and anti-Army. Indeed, as late as Lando's March 19, 1972 memorandum to Wallace (PX 10), which I have quoted *supra*, Lando was clearly suspicious and skeptical of the Army. But it is clear that during the succeeding months, Lando's mind set underwent a sea change. It is no exaggeration to say that Lando came to regard Herbert with emotions resembling hatred and contempt. Herbert could with justification regard the program and article as negative and "snide" towards him. One can sympathize with Sgt. Major Bittorie for regarding the program as a "hatchet job." But none of this, standing alone, amounts to actual malice in the constitutional sense. On this point, I cannot improve upon Judge Brieant's analysis in *Reliance Insurance Co. v. Barron's*, *supra*, at 442 F.Supp. 1352:

> "The Court has read the article, the depositions, the answers to interrogatories and the exhibits submit-

ted in connection with this motion. The Court has found no factual support for the contention that defendants published the article with 'actual malice.' The Court did, of course, notice the uncomplimentary tone of the article. But this does not in any way tend to prove that the author knew that statements in his article were false or that he had a reckless disregard, that is, entertained a serious doubt, as to the truth or falsity of his article. The fact that the publishers allowed the 'snide' tone to permeate the article similarly is no evidence that the article was published with actual malice. We recall once again that 'actual malice' does not mean hatred or contempt. Journalists are entitled to have and to express such views; that is no more than robust First Amendment expression.

"The Court is aware that any article replete with snide innuendos can be hurtful to a subject, and indeed may damage him in his business or reputation. But if he is a public figure, then he must bear the risk of such publicity as the price he pays for conducting activities or business in the public arena. If the financial press, or the press at large, had to fear libel suits when expressing dislike of certain persons or firms, or of business or other practices, the self-censorship that would inevitably occur would have a stifling if not smothering effect on the functioning of a free press. Public figures are exposed to public comment. Such comment will not be libelous unless the commentator wrote with 'actual malice,' as defined by the Supreme Court, and as contrasted with actual malice, or mere aversion or scorn."

Of course, as Lando unearthed statements or documents unfavorable to Herbert's contentions, Herbert vigorously challenged their veracity or reliability. But it is equally clear that such denials do not furnish clear

and convincing proof of actual malice. As Chief Judge Kaufman stated in *Edwards, supra,* at 556 F.2d 121:

> "Surely liability under the 'clear and convincing proof' standard of *New York Times v. Sullivan* cannot be predicated on mere denials, however vehement; such denials are so common-place in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error."

It is perhaps appropriate to point out that in submitting the statements in this case to constitutional analysis, the Court does not undertake to decide who is telling the truth. This opinion should not be read that way. For example, whether or not Lt. Col. Herbert actually reported war crimes to Col. Franklin in Vietnam on February 14 is known to Herbert, to Franklin, and also to God (at least I believe so), but is not found one way or the other in this opinion. My more limited analysis deals only with whether, on the basis of this record produced by painstaking discovery, a reasonable jury could find falsity; *and,* with convincing clarity, the requisite guilty knowledge.

Thus I conclude this section of the opinion with the question with which it began: has Herbert, in response to the CBS defendants' motion for summary judgment, demonstrated that a reasonable jury could find upon clear and convincing proof that Lando, Wallace and CBS were guilty of actual malice in the publication of false and defamatory statements? As to nine of the eleven challenged statements, I answer that question in the negative as a matter of law.

Accordingly what emerges at the end of this analysis are two statements which a jury could find were false, defamatory and made with knowledge of actual falsity: "Bittorie had no sons" (the article), and "to a man" those who saw Herbert in Vietnam after his relief "say

that Herbert never once said to them that he had been relieved because he had tried to push war crimes charges" (the program).[2] It is of course conceptually possible that of a number of allegedly actionable statements, some may impose liability if the jury finds the facts in plaintiff's favor, while other statements may not be actionable as a matter of law. The existence of one actionable statement is sufficient to defeat summary judgment in favor of the defendants concerned. Here there are two. Leaving Atlantic Monthly for consideration *infra*, Lando is implicated in the first of these statements and Lando, Wallace and CBS in the second. A trial involving those defendants in respect of those statements is accordingly required. But the CBS defendants' motion for summary judgment, in the light of the foregoing analysis, has been partially granted, and the issues substantially narrowed for trial. An order will issue under Rule 56(a),[3] following further submissions of counsel on that subject.

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[2] In his decision denying CBS's motion for summary judgment in *Westmoreland v. CBS Inc.*, 596 F.Supp. 1170 (S.D.N.Y., 1984), Judge Leval, undertaking a comparable analysis, pointed to several editing changes in a "CBS Reports" documentary's interviews or documents which a jury could find constituted deliberate falsifications by defendants. At 1174-1177. In respect of physical editing, no comparable incidents are revealed by the record in this case. Herbert complains that remarks he made at the beginning of his interview were transposed to the end. This may be questionable journalistic practice, but the contents of Herbert's remarks were not altered, and whatever misleading impression was generated does not rise to the level of knowing publication of a falsehood in the guise of fact.

[3] Rule 56(d) provides:

> "Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying

This division of defendants' statements into actionable and non-actionable also will presumably have an impact upon plaintiff's right to compensatory damages, assuming that he prevails on one or both of the actionable statements. While I do not rule on the point now because counsel have not yet addressed it, there is analogous authority for the proposition that Herbert can be compensated only for damages resulting from actionable statements, thereby requiring an allocation of damages between those statements which were injurious to reputation but non-actionable and those that are actionable. *Cf. Baden v. Koch*, 79 Civ. 4296-CSH (S.D.N.Y.), decided July 24, 1984, at 133-156 and cases cited (in civil rights action under 42 U.S.C. § 1983 for violation of liberty interest, where discharged public employee was denied name-clearing hearing after publication of stigmatizing charges against him, some of which were proved at trial to be true and others false, truthful charges, albeit stigmatizing, constitute noncompensable cause of damaging emotional distress). Plaintiff's claims for punitive damages are not involved in this discussion. Further briefs on this point will be invited from counsel.

IX.

The Alternative Defenses Asserted by Lando, Wallace and CBS

I have previously referred to the three alternative defenses urged by Lando, Wallace and CBS. In summary, they are that the program and article constitute protected reportage of a public controversy about a public figure, under *Edwards v. National Audubon Society, Inc.*, *supra*; that the program and article constitute protected

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the facts that appear without substantial controversy, including the extent to which the mount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

expressions of opinion about the same; and that the selection of information for inclusion in the program and article was a matter of editorial judgment beyond the competence of the courts.

While counsel's discussions of these issues in their briefs are able and provocative, I need not reach them in view of my conclusions on the issue of actual malice.

As noted under Point VIII, *supra*, nine of the eleven challenged statements could not be found by a reasonable jury to be false, defamatory and made with actual malice. That ends the case as far as those statements are concerned.

The remaining two statements, as to which trial is required, are actionable because a jury could find that the defendants in question uttered them deliberately and with knowledge that they were false. None of the three alternative defenses asserted by defendants would protect them from the consequences of such conduct. Accordingly I need not reach any conclusions in respect of the alternative defenses.[4]

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[4] Even as to the nonactionable statements, the CBS defendants' reliance upon *Edwards, supra*, appears doubtful. The constitutional privilege of neutral reportage and the common law privilege of fair report articulated in *Edwards* are not available where the news media "did not simply report the charges but espoused or concurred in them," *Cianci v. New Times Publishing Co., supra*, at 639 F.2d 69 (per Friendly, Ct.J.). That is what the program and article do *vis-a-vis* Herbert; "more naivete than ought to be demanded even of judges is needed to consider [them] as doing anything else." *Ibid.* The blanket immunity sought to be invoked under the rubric "editorial judgment" has, in public figure defamation cases, been rejected by an unbroken line of Supreme Court cases beginning with *New York Times v. Sullivan*, of which *Herbert v. Lando, supra*, is not the least instructive. The more limited defense based upon protected expressions of opinion is perhaps more substantial, but for the reasons stated I need not reach it.

X.

The Motion for Summary Judgment on Behalf of Atlantic Monthly

Atlantic bases its motion for summary judgment solely upon the actual malice issue arising from *New York Times v. Sullivan* and its progeny.

The case for Atlantic Monthly is that it published an unsolicited, inherently plausible article authored by Lando, an apparently responsible journalist, who responded satisfactorily to whatever questions Atlantic's editors and attorneys raised about the article's contents. Atlantic conducted no independent inquiry into the facts because that is not its practice. It maintains no research department. Atlantic's editing process—the use of an introductory "streamer," graphics, and the suggestion of additions to or modifications of the text—were routine, and did no more than accurately summarize or reflect the article's contents. If the article contained defamatory falsehoods about Herbert, Atlantic concludes, it had no knowledge of their actual or probable falsity.

If established, these propositions entitle Atlantic to summary judgment. Herbert's burden in resisting Atlantic's motion is the same as he faces against the other defendants. He must show that Lando's *Atlantic Monthly* article contained false statements defamatory of Herbert; and also that Atlantic's editors (as opposed to Lando) published those statements with subjective awareness of their actual or probable falsity.

Herbert's burden is the same in principle, but obviously more difficult in practice. While unusual circumstances may blur the lines of demarcation, *cf. Gertz v. Robert Welch, Inc.*, 680 F.2d 527 (7th Cir.1982), ordinarily there are significant differences between author and publisher in the context of a defamation suit. The author researches the facts. He travels afar, interviews

witnesses, and pores over documents. He forms opinions and arrives at conclusions. He distills all this in an article, and sends it unbidden to a potential publiser who, relying on the author's stature and integrity, publishes it. Assuming *arguendo* that the author has maliciously adulterated his text with known or probable falsehoods, it hardly follows that the publisher is aware that he did so. And yet that is what the public figure defamation plaintiff must show to hold the publisher liable. In these circumstances, it is not surprising that courts have on occasion denied summary judgment to an author, while granting it to the publisher. *See, e.g., McManus v. Doubleday*, 513 F.Supp. 1383 (S.D.N.Y.1981).

In the case at bar, plaintiff is critical of much that Atlantic did or did not do. An example of the latter is the undisputed fact that Atlantic did not conduct an independent investigation into Lando's criticisms of Herbert. Plaintiff's brief (at 230 and 235) characterizes this as an "active pre-publication effort to avoid information disclosing falsity," and a "rejection of any immediate rebuttal information and the absence of even the most minimal investigation or verification effort in the rush to get the article into print . . ." Stripped of rhetoric, this means that Atlantic did not investigate the facts itself before publishing the article. But it was under no obligation in law to do so, at least in the circumstances conceded to exist in this case.

Atlantic had nothing to do with researching or preparing the program. Therefore whatever truths Herbert may claim Lando or Wallace buried or distorted, or lies they told, during the course of that investigation and preparation cannot be ascribed to Atlantic.

Atlantic received Lando's manuscript as an unsolicited candidate for publication in *Atlantic Monthly*. The magazine was one of several Lando was considering as a potential vehicle for publication. Atlantic cannot there-

fore be regarded as the instigator of a piece intended to debunk or defame Herbert. *Cf. Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 538-39 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226, 103 S.Ct. 1233, 75 L.Ed.2d 467 (1983).

Lando, the contributor of this unsolicited work, was not a wild-eyed unknown, mouthing an improbable yarn about a prominent person. Rather, he was known to Atlantic's editors to be a former reporter with *Time* magazine and present producer of a respected (by many, at least) national news program. Lando had previously written a piece which *Atlantic Monthly* published. At the time of that publication (1967), Atlantic's editors had been favorably impressed with Lando's reportorial skills; and Manning had made inquiries about Lando at *Time*, receiving an equally favorable report.

The factual account related in the article, while unfavorable to Herbert, cannot be regarded as inherently implausible. Lando described the breadth and depth of his investigation. Furthermore, the article quotes at length from the transcript of the "60 Minutes" program. The Atlantic editors were thus aware that one of the main thrusts of the article (the existence of reasons to doubt Herbert's credibility) had already been passed upon by editorial quality control at CBS. To be sure, Herbert is not impressed by the integrity of that process; but the question in respect of Atlantic is whether Atlantic had reason to doubt Lando's veracity or the accuracy of his account. The fact that much of the article's substance had previously been broadcast by a respected news program was a factor the Atlantic editors were entitled to consider.

In addition, as the Atlantic editors' affidavits make clear, they had independent reasons for good faith doubts about Herbert, which had the converse effect of lending credibility to Lando. A number of journalists had written articles increasingly skeptical of Herbert's charges against the Army. Atlantic was aware of an unfavor-

able review of Herbert's earlier book about the Korean war, written by a respected military historian, General S.L.A. Marshall. Marshall cast doubts upon Herbert's credibility. Finally, Herbert, through his literary agent, McCauley, had in June of 1972 sent to Atlantic a copy of Herbert's own book *Soldier* for possible serialization. Various Atlantic editors expressed doubts about its believability in written memoranda which antedate the submission of Lando's manuscript to Atlantic.

Of course, the thrust of Lando's article is distinctly critical and negative towards Herbert. Being able to read, the Atlantic editors instantly perceived this. The editors, counselled by their attorneys, put questions to Lando which he answered to the editors' satisfaction. They also suggested relatively minor changes in language, which Lando accepted without demur.

It is also significant that Herbert and his literary agent knew several weeks in advance of publication that *Atlantic Monthly* was going to publish an article by Lando about Herbert. Herbert and McCauley had to expect that Lando's article would reiterate in considerable degree the contents of the program—as indeed it did. But the Herbert interests did not call to Atlantic's attention any *specific* falsehoods which they perceived in the program. They took up with Atlantic the *general* possibility of printing a riposte in the same issue. After publication there was a continuing dialogue about a response or critique on Herbert's behalf. None of these activities gave Atlantic pre-publication notice of specific, actual or probable falsity.

Plaintiff cites me to no case holding or suggesting that in circumstances comparable to these, a publisher like Atlantic is legally obligated to conduct an independent investigation into the facts asserted in an independent author's unsolicited manuscript. Indeed, controlling Supreme Court authority is precisely to the contrary. In

St. Amant v. Thompson, supra, the Court in expanding further upon *New York Times v. Sullivan's* concept of "recklessness" said at 390 U.S. 731, 88 S.Ct. at 1325:

> ". . . reckless conduct is not measured by whether a reasonably prudent man would have published, or *would have investigated* before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." (emphasis supplied).

St. Amant also holds that the defendant publisher would be in difficulty if what he published was "inherently improbable," or there were "obvious reasons to doubt the veracity of the informant or the accuracy of his reports." 390 U.S. at 732, 88 S.Ct. at 1326. That was the case in *Curtis Publishing Co. v. Butts, supra,* where the magazine publisher accepted without question unsupported charges against a respected football coach levied by a felon convicted of forging checks. Comparable liability was visited upon the publisher in *Goldwater v. Ginzburg,* 414 F.2d 324 (2d Cir.1969), *cert. denied,* 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed.2d 695 (1970), where the publisher knew that an article's researchers had falsified and fabricated answers to a questionnaire which formed part of the research. However, "in the absence of an evidentiary showing that a publisher has good reason to suspect . . . falsity," the publisher is under no legal duty to conduct an independent investigation into what an independent author has written. *Nader v. De Toledano, supra,* at 408 A.2d 57.

To be sure, the tenor of Lando's article reflected his "bias" against Herbert, if by "bias" we mean strong disapproval or dislike, even bordering (as suggested under Point VIII, *supra*) upon hatred and contempt. But Lando's animosity toward Herbert, standing alone, was sufficient neither to place Atlantic on notice of the actual or probable falsity of anything Lando said, or to require

Atlantic to conduct an independent investigation before publishing. Those arguments, which Herbert asserts, were laid to rest by the Second Circuit in *Hotchner v. Castillo-Puche, supra*, in which the author, Puche, wrote a book about Ernest Hemingway containing references unfavorable to one of Hemingway's acquaintances, Hotchner. Hotchner sued the book publisher, Doubleday, and offered evidence that Doubleday's editors were aware of Puche's dislike of him. This Court denied Doubleday's motion for summary judgment, referring to that evidence and the existence of some errors in the book known to Doubleday, concluding that "the jury might . . . find that, in light of their knowledge of Puche's low regard for Hotchner, Doubleday's employees were culpably reckless in not investigating further, or deleting the defamatory remarks." 404 F.Supp. 1041, 1049 (S.D.N.Y.1975). The case went to trial and a jury gave damages to Hotchner. The Second Circuit reversed, and directed dismissal of the complaint as a matter of law:

> "While Castillo-Puche's denunciations of Hotchner were sufficient to put Doubleday on notice of Castillo-Puche's animosity toward Hotchner, there was no reason to believe that Castillo-Puche had never really observed Hotchner. Knowledge of an author's ill-will does not by itself prove knowledge of probable falsity. Cf. *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir.1969). Thus, the evidence does not demonstrate that Doubleday had cause seriously to suspect the Castillo-Puche's opinions of Hotchner were without foundation. Doubleday's failure to conduct an elaborate independent investigation did not constitute reckless disregard for truth. Cf. *St. Amant v. Thompson, supra*, 390 U.S. at 733, 88 S.Ct. 1323; *New York Times Co. v. Sullivan, supra*, 376 U.S. at 287-88, 84 S.Ct. 710." 551 F.2d at 913-14.

See also Loeb v. New Times Communications Co., supra, at 497 F.Supp. 92 n. 12; *Fadell v. Minneapolis Star and*

Tribune Co., 425 F.Supp. 1075 (N.D.Ind.1976), *aff'd*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966, S.Ct. 508, 54 L.Ed.2d 452 (1977); *Martin Marietta Corp. v. Evening Star Newspaper*, 417 F.Supp. 947, 959 (D.D.C.1976); *McManus v. Doubleday, supra; Rinaldi v. Holt, Rinehart*, 42 N.Y.2d 369, 382-83, 397 N.Y.S.2d 843, 366 N.E.2d 1299 (1977).

The cases which plaintiff cites in support of Atlantic's asserted duty to conduct an independent investigation turn upon entirely different fact situations, and furnish no authority for fixing liability upon Atlantic in this case.

Nor can liability arise from the contributions which Atlantic made to the article. Atlantic editors composed the introductory "streamer," but the streamer's obvious purpose was to identify and summarize the contents of the article. There is no suggestion that the streamer did this inaccurately, or that it introduced factual assertions which are not made in the article itself. The graphics of the progressively riddled soldier-silhouette stand upon the same footing. They accurately depict one of Lando's themes: that he first believed in Herbert, but his belief was gradually eroded by a series of perceived factual discrepancies. No case of actual malice can be made from Atlantic's suggestion, accepted by Lando, that the text of the article contain the reference to General S.L.A. Marshall's unfavorable comments about Herbert. It is not suggested that General Marshall did not say these things, or that the quotation was false or fabricated. Finally, editing of the article's concluding paragraph so as to include the phrase "feet of clay" does no more than restate in colloquial form the very point that Lando was clearly stating in his article.

For these reasons, I regard Atlantic's "contributions" to the article as nothing more than editorial techniques intended to attract and retain the reader's eye, and summarize the contents of the article. As such, I do not

regard them as constituting Atlantic's "endorsement" of the article, in the sense of proclaiming an independent *imprimatur* of its truth. However, even if these editorial contributions should be so regarded, there is no proof that Atlantic's editors knew of the actual or probable falsity of anything in the article. But the existence of such proof, of sufficient quantity and quality to permit a reasonable jury to form a clear conviction of Atlantic's guilty knowledge, was what plaintiff had to show to defeat Atlantic's motion for summary judgment.

Plaintiff having failed entirely to do so, the motion of Atlantic for summary judgment will be granted.

CONCLUSION

The motion of the Atlantic Monthly Company for summary judgment is granted. The Clerk of the Court is directed to dismiss the complaint as against that defendant with prejudice and with costs.

The motion on behalf of defendants Lando, Wallace and CBS for summary judgment is granted in part and denied in part. The case will go forward in conformity with this opinion. I make no order at this time with respect to costs as to those defendants.

It is SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 74 Civ. 434-CSH

ANTHONY HERBERT,
Plaintiff,

v.

BARRY LANDO, MIKE WALLACE,
COLUMBIA BROADCASTING SYSTEM, INC.,
Defendants.

Feb. 27, 1985

MEMORANDUM OPINION
AND ORDER

HAIGHT, District Judge:

In this action for defamation brought by a public figure plaintiff and arising out of a television program and subsequent magazine article, defendants Lando, Wallace, and Columbia Broadcasting System, Inc. ("CBS") moved for summary judgment dismissing the complaint. This Court granted the motion in part and denied it in part, thereby requiring trial on two particular statements ascribed to defendants. That decision is reported at 596 F. Supp. 1178 (S.D.N.Y. 1984), with which familiarity is assumed.[1]

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[1] The Court granted summary judgment to the magazine publisher, Atlantic Monthly Company, and dismissed the complaint as to it.

Plaintiff and defendants now cross move for reargument pursuant to Civil Rule 3(j) of this Court. Plaintiff asks that the complaint be entirely reinstated. Defendants ask that it be entirely dismissed. Both motions are denied.

Rule 3(j) provides that to succeed on a motion for reargument, the moving party bears the burden of "setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked." Implicit in that obligation is the conclusion that if such "matters or controlling decisions" are not demonstrated, the motion fails.

As for plaintiff, his further extensive briefs seek to reargue, without making the requisite showing, a considerable number of the adverse determinations contained in the Court's prior opinion. Only one argument warrants consideration here. That is the contention appearing in plaintiff's Main Brief on Reargument at 4:

> "Plaintiff's position throughout this litigation, also advanced in his opposing papers, has been that he was defamed by the program and article as a whole and not simply by isolated statements removed from that overall defamatory context. . . . By failing to consider plaintiff's contentions regarding the defamations caused by the program and article as a whole, the court disregarded controlling precedent which holds that libel actions may be grounded upon the defamatory import of the publication as a whole."

Plaintiff supports this indictment by citing the string of cases set forth in the margin.[2] The fault in the Court's

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[2] *Golden Bear Distributing Systems of Texas, Inc. v. Chase Revel, Inc.*, 708 F.2d 944 (5th Cir. 1983); *Street v. NBC*, 645 F.2d 1227 (6th Cir. 1981), *cert. dismissed*, 454 U.S. 1095, 102 S.Ct. 667, 70 L.Ed.2d 636 (1981); *Hoffman v. Washington Post Co.*, 433 F.Supp. 600 (D.D.C. 1977), *aff'd*, 578 F.2d 442 (D.C.Cir. 1978); *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649 (D.C.Cir. 1966) (*en banc*); *Sellers v. Time, Inc.*, 423 F.2d 887 (3rd Cir.), *cert.*

prior opinion, as perceived by plaintiff, is that the Court "erroneously treated plaintiff's position regarding the defamations at issue as restricted to eleven statements," *id.* at 2. That is a reference to eleven particular statements which, in his brief opposing summary judgment, plaintiff culled from the television program and the article and alleged were defamatory, false, and published with knowledge of falsity. The Court's prior opinion considered each of those eleven statements with respect to whether or not they were "actionable," that is, "susceptible of imposing liability at the hands of a reasonable jury properly instructed on the law." 596 F. Supp. at 1198.

No district judge particularly enjoys being told that he has "disregarded controlling precedent." To avoid that professional embarrassment, the judge relies (a) upon the briefs of counsel, and (b) his own knowledge of the law, as supplemented by independent research. The judge reasonably relies upon counsel to call to his attention "controlling precedent" bearing upon the issues at hand. These reflections are prompted by the fact that none of the nine cases plaintiff now identifies as controlling precedents which this Court disregarded was cited in plaintiff's 282-page brief in opposition to summary judgment, which cited 106 other cases. Nor was the argument presently put forward included in that brief, although the defendants, in their motion for summary judgment following extensive discovery, launched a broad scale attack upon the viability of plaintiff's claims.

If the plaintiff's new argument were sound, and the authorities now cited for the first time apposite, his motion for reargument would pose a question of substance,

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denied, 400 U.S. 830, 91 S.Ct. 61, 27 L.Ed.2d 61 (1970); *Mulvihill v. Forbes*, 9 Med.L.Rptr. 1137 (D.N.J. 1982); *Wilder v. Johnson Publishing Co.*, 551 F.Supp. 622 (E.D.Va. 1982); *Green v. Northern Publishing Co., Inc.*, 8 Med.L.Rptr. 2515 (Alaska Sup.Ct. 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 3539, 77 L.Ed.2d 1389 (1983); *Clark v. Pearson*, 248 F.Supp. 188 (D.D.C. 1965).

notwithstanding the Court's perhaps understandably puzzled state at not having been told about them before. In fact, however, the argument is not sound, and the cases do not focus upon the analysis pursued in the Court's prior opinion. In consequence, what emerges is not a puzzling case of advocate's amnesia, but an unsuccessful effort to recast claims which discovery has demonstrated are not actionable.

The cases now cited by plaintiff stand essentially for the proposition that whether or not statements are capable of a defamatory interpretation often turns upon the context in which they appear. It is quite true, as plaintiff argues on the present motion, that "libel actions may be grounded upon the defamatory import of the publication as a whole." The cases cited by plaintiff, fn. 1 *supra*, illustrate the working of that rule.

Golden Bear Distributing Systems of Texas v. Chase Revel, Inc. did not involve a public figure plaintiff. Hence the measure of liability was negligence, not malice, as in the case at bar. The holding upon which plaintiff relies relates to the initial inquiry of whether the article in question contained an actionable defamatory meaning. The purported quotation from the case (plaintiff's Main Brief on Reargument at 5) does not in fact appear in the Fifth Circuit's opinion; what does appear is this:

> "The evidence presented at trial suggests that all the individual statements in the magazine article concerning Golden Bear of California's fraudulent activities and Golden Bear of Texas' representations to potential investors were true. The basis of the libel lies in the juxtaposition of truthful statements about one company with truthful statements about the illegal operations of an independent company of the same name located in a different state."
> 708 F.2d at 948.

Street v. NBC involved a suit by the prosecutrix and main witness in the famous Scottsboro rape trial. She

sued NBC for defamation, NBC having televised a play dramatizing the role of the presiding judge at one of the Scottsboro trials. The plaintiff was held still to be a "public figure." Her claim was based on nine specific scenes in the play, each of which plaintiff contended contained false and defamatory statements of fact which she specifically identified. 645 F.2d at 1230-32. Having examined those statements in detail, the Sixth Circuit predictably concluded that "[t]he facts recited above illustrate that the play does cast plaintiff in an extremely derogatory light. She is portrayed as a perjurer, a woman of bad character, a woman who falsely accused the Scottsboro boys of rape knowing that the result would likely be the electric chair." 645 F.2d at 1232. That recitation led to the equally unsurprising conclusion: "Taken as a whole, the play conveys a defamatory image of the plaintiff." *Ibid.* Having resolved in plaintiff's favor the issue of whether the play was defamatory, the Sixth Circuit then turned to the separate question of whether plaintiff had adduced evidence sufficient to support a jury verdict of malice. The court answered that question in the negative, and affirmed the district court's directed verdict for NBC:

> "So long as there is no evidence of bad faith or conscious or extreme disregard of the truth, the speaker in such a situation does not violate the malice standard. His version of history may be wrong, but the law does not punish him for being a bad historian.
>
> "The malice standard is flexible and encourages diverse political opinions and robust debate about social issues. It tolerates silly arguments and strange ways of yoking facts together in unusual patterns." 645 F.2d at 1237.

Hoffman v. The Washington Post Company considered whether five particular statements in a newspaper article about plaintiff, a trainer of athletes, were defamatory in respect of the efficacy of dietary supplements sold by

plaintiff, a public figure within the limited area of his claimed expertise. Defendant moved for summary judgment. The district court declined to read the five statements "as discrete units, for the challenged publication must be read as a whole. Its content must be considered in its entirety and weighed in connection with its structure, nuances, implications, and connotations." 433 F. Supp. at 602 n.1. The district judge concluded that the defendants' article "was defamatory because it imputed dishonest conduct to Bob Hoffman and tended to disgrace him and bring him into ridicule." *Id.* at 603. However, summary judgment was granted to defendants, after discovery, because "[t]he record in this case fails to demonstrate that plaintiff could produce clear and convincing evidence that each defendant acted with actual malice," *id.* at 605.

Afro-American Publishing Co. v. Jaffe involved an appeal by defendants after bench trial in a libel action brought by a pharmacist who operated a local drugstore in Washington, D.C. Plaintiff, who was white, served a neighborhood where 80% of his customers were black. Plaintiff ceased distributing the defendant's newspaper "Afro" because he regarded it as racist and inflammatory. This provoked an editorial in "Afro" critical of plaintiff, prompting a suit for invasion of privacy and defamation. Plaintiff recovered compensatory and punitive damages on both counts. The District of Columbia Circuit, sitting *en banc*, reversed the award for invasion of privacy, 366 F.2d at 654, but affirmed the judgment for compensatory (although not punitive) damages for defamation. The court stated generally that the publication "must be taken as a whole, and in the sense in which it would be understood by the reader to whom it was addressed"; certain "false statements were critical in the total impact of the article. The article contained other items that were true, but in the setting already described these only reinforced the defamatory impression." *Id.* at 655. It is worth noting that the Court of Appeals specifically

found that the plaintiff was not a public figure, so that he was not required to prove malice under *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and its progeny.

Sellers v. Time, Inc., a diversity action turning upon Pennsylvania law, involved a *Time* magazine article about a businessman-golfer who succeeded in driving a golf ball backwards and into the eye of a golfing partner. The perpetrator of this unintended assault was sued by his golfing partner; he pleaded the defense of assumption of the risk; *Time* regarded the incident as newsworthy and published an article about it. In plaintiff's ensuing suit for libel, defendant moved successfully for summary judgment. The Third Circuit noted plaintiff's contention that various perceived innuendoes "support his contention that the article as a whole portrays him as one for whom business success overrides all concerns for others," 423 F.2d 890, but concluded that the article was not defamatory: "While the article may have caused Sellers great personal annoyance, annoyance alone does not constitute defamation." *Id.* at 891 (citing Pennsylvania cases).

Mulvihill v. Forbes is another case in which the motion of the defendant, *Forbes* magazine, for summary judgment was granted. A *Forbes* article discussed "boiler shop" security operations and mentioned plaintiff's name. The Court said: "The issue in the instant case, simply stated, is whether there has actually been a defamation." 9 Med.L.Rptr. at 1138. The district judge accepted plaintiff's argument that "the court should review the article as a whole, and not view the passage which names Mulvihill out of context," but went on to say: "The court does not believe that the article, viewed as a whole, can reasonably be considered to be defamatory." *Id.* at 1140-41.

Wilder v. Johnson Publishing Co. also turned only upon the question of whether or not a published article was defamatory, the issue arising within the context of

defendant's motion to dismiss the complaint under Rule 12(b)(6) for failure to state a claim. The district court held that one aspect of the article was not defamatory, but that another aspect was, and set the case down for trial in respect of that aspect. No other issues were raised or decided.

Green v. Northern Publishing involved an action by a physician appointed by prison authorities to supervise the health of incarcerated individuals. The death of a prisoner in custody excited newspaper attention, culminating in an editorial which reported the termination of the plaintiff physician's services by the prison authorities, and made other comments concerning him. The Alaska Supreme Court reversed a summary judgment in defendant's favor. The opinion deals first with the question of whether or not the editorial was defamatory of plaintiff, the court concluding that it was 8 Med.L.Rptr. at 2418. Turning to the separate issues present, the Court observed generally: "Defamation defendants have two defenses—truth and privilege." *Ibid.* Citing *New York Times Co. v. Sullivan, supra,* the Alaska Supreme Court refers to "a conditional constitutional privilege for media defendants in defamation suits brought by 'public officials.' The 'condition' was that the privilege applied only if the media defendant had not uttered the defamation with 'actual malice', *i.e.*, with actual knowledge that its utterance was false or with reckless disregard for its truth or falsity." *Ibid.* The Court held that the physician plaintiff should be regarded as a "public official," and that, on the evidence in the record, reasonable jurors could find that at least one statement in the editorial was published with malice.

Clark v. Pearson, another case dealing with the issue of defamation, states generally: "An accused publication must be read as a whole. Its content must be considered in its entirety and weighed in connection with its structure, nuances, implications and connotations. . . . It is

not sufficient to take every sentence separately and demonstrate its individual accuracy, detached and wrenched out of its context." 248 F.Supp. at 191. The district judge concluded that the article in question could reasonably be regarded as defamatory, and denied defendant's motion for summary judgment. It is worth nothing, however, that the court also regarded the plaintiff as a private individual, and not a public figure, *id.* at 195, so that the case did not present the question of actual malice.

I have no quarrel with the holdings or the rationales of any of these cases. Nor does this Court's prior opinion depart in any way from their principles.

Plaintiff's claim on reargument of judicial disregard of "controlling precedent" itself disregards the three separate issues which arise in a public figure's libel action against the media. "When a public figure sues for defamation, the first amendment bars recovery unless the defamatory falsehoods were made with knowledge of falsity or with reckless disregard for the truth." *Hotchner v. Castillo-Puche*, 551 F.2d 910, 912 (2d Cir. 1977). Thus before a media defendant may be held liable to a public figure plaintiff, the plaintiff must prevail on each of three discrete issues: (1) was the statement defamatory? (2) was the statement false? (3) was the statement published with actual malice? It will be recalled that these are the precise questions, and in that order, submitted by Judge Sofaer to the jury in *Sharon v. Time, Inc.*, 83 Civ. 4660 (ADS). Sharon's complaint was dismissed because, although he prevailed on the first two questions, the jury held against him on the third. The separate and independent nature of these three issues is further emphasized by the fact that the plaintiff's burdens of proof as between them are different: ". . . there is a significant difference between proof of actual malice and mere proof of falsity," *Bose Corp. v. Consumers Union of U.S., Inc.*, —— U.S. ——, 104 S.Ct. 1949, 1965, 80 L.Ed.2d 502 (1984).

This brings me again to the task I set myself in response to defendants' motion for summary judgment, namely, to consider whether the eleven specific statements identified by plaintiff were "actionable," in the sense of permitting a reasonable jury to answer all three questions in plaintiff's favor. In respect to the nine statements as to which summary judgment was granted, I concluded that a reasonable jury, properly instructed, could not do so.

A reading of the Court's prior opinion makes it plain that the main focus was upon whether or not a jury could find that plaintiff had proved actual malice by that measurably heavier burden of "clear and convincing evidence." In emphasizing that issue, I did not disregard the others. It was the parties themselves, in their motion papers, who concentrated upon the issue of actual malice. It would be an exaggeration to say that the defendants conceded that the program and the article were defamatory; but the argument was not emphasized, the main debate revolving around the issue of malice. While as an alternative ground for decision I concluded that some of the statements were not defamatory, defendants' motion for summary judgment, to the extent that it was granted, depends primarily upon the Court's conclusions concerning the challenged statements that plaintiff could not prove actual malice at trial. Nothing in plaintiff's motion for reargument causes me to question those conclusions.

Plaintiff complains of the Court's concentration upon the eleven specific statements which plaintiff urged in his brief were defamatory, false, and published with malice. I remain of the view that plaitniff was entitled to no more than that. Fully appreciating plaintiff's contention that "he was defamed by the program as a whole, not simply by particular statements made on the program," Main Brief on Reargument at 2, even those cases which properly consider the publication as a whole in determin-

ing defamation *vel non* typically begin their analyses with the particular statements alleged to be false and defamatory. *Street v. NBC, supra,* is illustrative. The nine specific incidents identified by plaintiff as false and defamatory, within the context of the Scottsboro play as a whole, are the functional equivalents of the eleven statements identified by the present plaintiff as false and defamatory within the context of the television program and article.[3]

There are policy reasons for requiring specific pleading in cases of this nature. Media discussion of a public figure's conduct enjoys presumptive First Amendment protection. *Small v. ABC,* 10 Med.L.Rptr. 2391, 2392 (N.D.Iowa 1984); *Barger v. Playboy Enterprises, Inc.,* 564 F.Supp. 1151, 1154 (N.D.Cal.1983). In *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers,* 542 F.2d 1076, 1082-83 (9th Cir. 1976), the Ninth Circuit stated generally that in cases involving "conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." Because of that principle, the district court in *Small v. ABC, supra,* an action which like the case at bar alleged defamation in a television news program, granted defendants' motion "to require the

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[3] *Golden Bear Distributing Systems of Texas v. Chase Revel, Inc., supra,* appears at first blush to be different because the Fifth Circuit said at 708 F.2d 948 that "all the individual statements . . . were true." But *Golden Bear's* particular facts make any difference more apparent than real. The particular libel of which plaintiff complained lay "in the juxtaposition of truthful statements about one company with truthful statements about the illegal operations of an independent company of the same name located in a different state." *Ibid.* In other words, by misleading editing the defendant achieved the functional equivalent of a false statement, which plaintiff identified and specifically challenged as defamatory. Plaintiff makes no comparable claim in the case at bar.

plaintiff to state in his complaint the exact words broadcast which were defamatory." *Id.* at 2392. Given the constitutional implications of such cases, that is not asking too much of a public figure plaintiff. In the case at bar, defendants made no such motion addressing the sufficiency of the complaint; plaintiff's specifications of "the exact words [broadcast and in the article] which were defamatory" first emerged in his opposition to summary judgment. The inadequacy of general allegations of defamation, divorced from the specific words plaintiff challenges, is all the more apparent in light of the established rule that, on the separate issue of actual malice, an article's "uncomplimentary" or "snide" tone "is no evidence that the article was published with actual malice". *Reliance Insurance Co. v. Barrons'*, 442 F.Supp. 1341, 1352 (S.D.N.Y.1977). Judge Leval made the same point more recently in *Westmoreland v. CBS*, 601 F.Supp. 66, 68 (S.D.N.Y. 1984):

> "Publishers and reporters do not commit a libel in a public figure case by publishing unfair one-sided attacks. The issue in the libel suit is whether the publisher recklessly or knowingly published false material. The fact that a commentary is one sided and sets forth categorical accusations has no tendency to prove that the publisher believed it to be false."

First Amendment implications aside, under general principles it is usually held that a defamation plaintiff does not satisfy the requirements of notice pleading unless he specifically alleges the words said to be actionable. *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 699 (8th Cir.1979) ("Nevertheless, the use of *in haec verba* pleadings on defamation charges is favored in the federal courts because generally knowledge of the exact language used is necessary to form responsive pleadings."). The Second Circuit, construing New York law in diversity cases, has reached the same conclusion. *Foltz v. Moore-McCormick Lines*, 189 F.2d 537, 539 (2d Cir.1951) ("It

is true that in actions for libel or slander the false and defamatory matter should be pleaded *in haec verba.*"), citing and approving *Simpson v. Oil Transfer Corporation*, 75 F.Supp. 819, 822 (N.D.N.Y.1948) ("It has long been held that defamatory words must be set forth in the complaint, if an action is to be based thereon."). For further New York authority, see N.Y. CPLR § 3016(a) (McKinney 1974): "In an action for libel or slander, the particular words complained of shall be set forth in the complaint. . . ."; *Laiken v. American Bank & Trust Company*, 34 A.D.2d 514, 308 N.Y.S.2d 111, 112 (1st Dept. 1970) ("The complaint in an action for slander is required to state *in haec verba* the words used. This requirement is strictly enforced and the exact words must be set forth.").[4]

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[4] In his reply brief on reargument, plaintiff cites for the first time *Locricchio v. Evening News Association, Inc.*, No. 64729 (Mich. App. entered August 24, 1983), *reh'g. denied* (October 17, 1983), *cert. denied*, —— U.S. ——, 105 S.Ct. 433, 83 L.Ed.2d 360 (1984). The suit arose out of a series of allegedly defamatory articles published in the Detroit News concerning plaintiffs' activities with regard to the development and operation of an entertainment complex. Defendants interposed interrogatories asking plaintiffs to specifically identify each statement claimed to be defamatory or false. Plaintiffs in their answers did not do so, contending rather that "the entire series of articles, in their entirety" defamed them by presenting "a false portrayal, implication, imputation and/or insinuation" that plaintiffs were, *inter alia*, members of the Mafia. On the basis of that response, defendants moved for summary judgment. The trial court denied summary judgment and the Michigan Court of Appeals affirmed, expressing the view that the pleadings raised "a genuine issue of material fact as to whether the specified articles, read as a whole, carry a defamatory insinuation or inference that plaintiffs are associated with organized crime."

Locricchio, while to a degree supportive of plaintiff's position, does not alter the conclusions which I reach in the case at bar. Michigan law, to the extent that it forms the basis for decision, is not applicable here. There is no indication that the plaintiffs were public figures—indeed, one infers that they preferred to keep a low profile—and so the constitutional considerations implicit when

In the light of these authorities, it is useful to review the chronology of the case at bar. Plaintiff's complaint alleged that the program and the article defamed him in several respects. Those allegations were reiterated in plaintiff's motion opposing summary judgment. 596 F. Supp. at 1184. The allegations of the complaint were general and conclusory. They are of doubtful sufficiency under New York law as interpreted by the Second Circuit.[5] But defendants did not test the sufficiency of the pleading by motion. Instead, they joined issue by answer. Pre-trial discovery then began. The boundaries of proper discovery were litigated and eventually resolved by the Supreme Court. 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). During discovery, plaintiff and the individual defendants each testified for days. Other witnesses were deposed. Tens of thousands of pages of testimony were generated. Hundreds of exhibits were produced. After completion of discovery, defendants moved for summary judgment. They argued that nothing in the article or program was false or defamatory; but that in any event, the discovery demonstrated that, as a matter of law, plaintiff could not prove actual malice by clear and convincing evidence that any statement was made with actual malice.

Plaintiff's answering papers identified eleven specific statements in the program and article which plaintiff claimed were false, defamatory, and known by defendants to be false. Brief at 224-228. They fell within one

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the media discuss public figures do not arise. Furthermore, *Locricchio* came to the Michigan Court of Appeals at the pleading stage; no discovery had been held, and as the result of the combination of these circumstances, the issue of actual malice was not before the court.

[5] Plaintiff's allegations of defamation are no more specific than those condemned in *Simpson v. Oil Transfer Corporation, supra,* at 75 F.Supp. 822, or those found insufficient for defamation purposes in *Foltz v. Moore-McCormack Lines, supra,* 189 F.2d at 539, which approved *Simpson.*

or another of the general areas of defamation plaintiff articulated in his pleadings. Plaintiff discussed these specific statements separately, with references to prior analyses in the brief (pages 37-156) of the evidence pertinent to each of them.

Defendants' reply papers focused upon those eleven statements. Defendants argued that certain of the statements were not false, or if false, not defamatory; but that in no case could plaintiff demonstrate actual malice.

The Court's opinion, granting summary judgment in part and denying it in part, similarly focused upon the eleven statements specified by plaintiff. The evidence as to each statement was reviewed. Nine statements were found to be nonactionable, and the remaining two statements actionable. 596 F.Supp. at 1198-1224.

Plaintiff now contends on reargument that the Court should not have concentrated upon the eleven statements discussed in the briefs, but should rather have adjudicated the summary judgment motion on the basis of plaintiff's more general and conclusory allegations of defamation set forth in the pleadings.

I cannot, under prevailing law, accept that proposition. It is simply not sufficient for a public figure libel plaintiff, bearing the burdens of proof imposed by existing law on the discrete issues of defamation, falsity, and actual malice, in resisting a summary judgment motion after extensive discovery, to proffer the full text of a media program or article and argue that its general tone or thrust could sustain a plaintiff's verdict. The media, protected by the First Amendment, and the Court, charged *inter alia* with its enforcement, are entitled to be directed by the public figure plaintiff to specific statements which are defamatory; false (the falsity lying *in haec verba* or dishonest juxtaposition of true statements); and which a jury could find on clear and convincing evidence were published with actual malice. The

present plaintiff undertook that burden in his opposing papers, and the Court dealt fully with the issues as raised. Disappointed in the result, and under the guise of a motion for reargument, plaintiff attempts a different and less demanding approach which constitutional principles reject. Plaintiff's difficulty lies in part in the failure to plead specifically; but it is much more than that. After comprehensive discovery, plaintiff has not shown, save for the two statements as to which summary judgment was denied, that a reasonable jury could find actual malice in respect of any statement uttered by any defendant.[6]

I have considered the other contentions of the parties. They do not conform to the requirements of the rule governing motions for reargument, and require no further discussion.[7]

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[6] I am inclined to the view that, when a public figure plaintiff sues the media for libel, he must allege the actionable words with precision or be non-suited. Such a requirement is not inconsistent with the rule that the allegedly offending publication must be read as a whole; that salutary principle requires that the specified words be read in context. *Cf. Cianci v. New Times Publishing Co.*, 639 F.2d 54 (2d Cir. 1980), where the former mayor of Providence pointed to the headline in a newspaper article about him—"BUDDY WE HARDLY KNEW YA"—and Judge Friendly observed that a jury, "considering this in light of the article as a whole, could surely conclude that New Times was saying that Mayor Cianci" was a disreputable character. It is a quite different proposition to say that a public figure plaintiff sufficiently alleges a defamation action against the media without specifically identifying the offending statements, relying instead upon general allegations of insinuation or suggestion. I would be inclined to hold, in a case where the issue is squarely presented, that the First Amendment protection afforded to the press includes protection against embarking upon that slippery slope of interpretation. But I need not decide the issue in the case at bar, because defendants moved not on the pleadings, but for summary judgment after comprehensive discovery.

[7] Plaintiff offers, in his briefs on reargument, four additional specific statements said to be actionable. Main Brief on Reargument

The motions for reargument are denied in their entirety. Trial will go forward in accordance with the separate scheduling order entered concurrently.

It is SO ORDERED.

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at 25-27. Given the chronology of the case, these additional claims are untimely. In any event, the statements are not actionable.

Plaintiff attacks the credibility of helicopter pilot Plantz's descriptions of incidents involving Herbert, as recounted by Wallace on the program. But Lando, who researched the program, was not required in law to credit Herbert's denials, or the hearsay opinions of Kahila, Peyser and Bruce Potter that such incidents were unlikely to have occurred; or pursue independent corroboration of Plantz. There is no evidence that Lando or Wallace knew Plantz's statements were false, or that they had a "high degree of awareness of their probable falsity," *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964), cited in this Court's prior opinion at 596 F.Supp. 1187.

Rosenblum's opinion that the Barnes investigation "wasn't a whitewash," included on the program, was his personal opinion, based on reasons which he articulated, and is not actionable on any theory. Furthermore, the facts that Barnes "took the Fifth" and the investigators chose not to call as witnesses certain individuals is not inconsistent with Rosenblum's reasoning, or the opinion he expressed that the Army conducted a thorough investigation.

Wallace's statement and Lando's writing concerning the claims of LTC Nicholson and Major Crouch that they flew back from Hawaii to Vietnam with Franklin are peripheral to the particular defamation plaintiff alleges, namely, that Franklin was not in Vietnam on February 14 to receive the report that Herbert says he gave him. See 596 F.Supp. at 1210-1212. On reargument plaintiff argues Crouch should not be believed. The reasons given do not, and could not, amount in law to a showing that Lando knew what both Crouch and Nicholson reported about their trip with Franklin were false or probably so.

Supreme Court, U.S.
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No. 85-1685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANTHONY HERBERT,

Petitioner,

v.

BARRY LANDO, MIKE WALLACE,
COLUMBIA BROADCASTING SYSTEM, INC., AND
ATLANTIC MONTHLY COMPANY,

Respondents.

OPPOSITION ON BEHALF OF ATLANTIC MONTHLY COMPANY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Neither of the questions presented by Petitioner Herbert raises any issue germane to the grounds on which summary judgment was granted Respondent Atlantic Monthly Company below. Petitioner has failed to state a question as to this Respondent satisfying Supreme Court Rule 21.

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STATEMENT OF CASE

Following a tour of duty in Vietnam in 1968-69, Petitioner Herbert, now a retired Army officer, accused his superior officers of covering up war crimes and of relieving him from command of the 2d Battalion of the 173d Airborne Brigrade because he had reported such crimes. Petitioner recounted his alleged experiences in a book entitled *Soldier*. He appeared on television, including three times on "The Dick Cavett Show," to promote his story.

Respondents Lando, Wallace and Columbia Broadcasting System, Inc. (CBS), produced a television report on Petitioner's allegations.[1] This report was aired by CBS as part of its weekly "60 Minutes" program on February 4, 1973. The report questioned Mr. Herbert's version of some of the events which he had publicized.

Respondent Lando subsequently wrote a magazine article about his experiences in researching and developing the "60 Minutes" segment on Petitioner Herbert. The article, which was entitled "The Herbert Affair," was published by Respondent Atlantic Monthly Company in the May 1973 issue of *Atlantic* magazine. It discussed Mr. Lando's progressive disillusionment with Mr. Herbert's story as he probed for the facts.

It is undisputed that Atlantic Monthly did not solicit the article authored by Mr. Lando. Similarly, it is undisputed that Mr. Lando, whom the *Atlantic*'s ed-

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[1] The parties are as stated in the caption. Pursuant to Supreme Court Rule 28.1, Respondent Atlantic Monthly Company represents that it has no parent, partially-owned subsidiary, or affiliate.

itors reasonably believed to be a responsible journalist,[2] presented the magazine with an inherently plausible article. *Atlantic*'s editing process with respect to the article was routine. Thus, although the magazine could not conduct an independent investigation of the facts represented in the article (*Atlantic* maintains no research department), Mr. Lando responded to whatever questions were raised by *Atlantic*'s editors or attorneys, in some cases modifying the article. *Atlantic*'s "streamer" describing the article was an accurate summary of the article and merely reflected its contents. In addition, Petitioner Herbert was aware of the article before its publication and made no effort to supply any information contrary to it. If the article contained defamatory falsehoods about Mr. Herbert, Atlantic Monthly had no knowledge of their actual or probable falsity.[3]

In light of the total lack of evidence, even after extensive discovery, of any knowledge of actual or probable falsity on the part of Atlantic Monthly, the magazine moved for summary judgment dismissing

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[2] Mr. Lando

> was known to *Atlantic's* editors to be a former reporter with *Time* magazine and present producer of a respected . . . national news program. Lando had previously written a piece which the Atlantic Monthly published. At the time of that publication (1967), *Atlantic's* editors had been favorably impressed with Lando's reportorial skills; and [Atlantic Monthly personnel] had made inquiry about Lando at *Time*, receiving an equally favorable report.

Herbert v. Lando, 596 F. Supp. 1178, 1229 (S.D.N.Y. 1984), App. 127a.

[3] *Herbert v. Lando*, 596 F. Supp. 1178, 1228-31 (S.D.N.Y. 1984), App. 125a-132a.

Mr. Herbert's complaint. The District Court granted summary judgment to Atlantic Monthly on this ground, expressly finding that

> "there is no proof that *Atlantic's* editors knew of the actual or probable falsity of anything in the article."

Herbert v. Lando, 596 F. Supp. 1178, 1231 (S.D.N.Y. 1984), App. 132a. The Court of Appeals agreed, labelling the rationale of the District Court "compelling," and stating that

> "[o]ur independent review of the evidence for actual malice . . . reveals to us no indication that *Atlantic Monthly* exercised malice in publishing Lando's article."

Herbert v. Lando, 781 F.2d 298, 308 (2d Cir. 1986), App. 15a.

SUMMARY OF ARGUMENT

Petitioner Herbert has failed to present a question to this Court raising an issue with respect to the grounds on which summary judgment was granted to Respondent Atlantic Monthly Company. Petitioner Herbert failed to present any evidence of actual malice on the part of Atlantic Monthly, and summary judgment was appropriately granted to the magazine on that ground. Mr. Herbert's petition for certiorari accordingly must be denied as to Atlantic Monthly.

ARGUMENT

As the District Court observed below (596 F. Supp. at 1197, 57a), Petitioner Herbert tends to "lump" all the "defendants together indiscriminately[,] . . . [b]ut

there are significant differences in status." In his petition for certiorari petitioner Herbert again disregards these differences. As a result, the questions tendered this Court have nothing to do with the rationale employed by the District Court in granting, and the Court of Appeals in affirming, summary judgment for Atlantic Monthly.

The first question tendered by Petitioner Herbert is

> "Whether the Court of Appeals correctly held that specific defamatory falsehoods that may have been made with actual malice should not be actionable if they are 'subsidiary' to 'larger' libels that have been found to be non-actionable under that same standard of proof."[4]

Even if this question is resolved in Petitioner's favor, it in no way calls into question the correctness of the lower courts' holdings that no evidence had been adduced by Petitioner of "actual malice" on the part of Atlantic Monthly.

The second question tendered by the Petitioner is

> "Whether the First Amendment prohibits a libel action based upon the particular defamatory meanings conveyed by a publication as a whole, as distinguished from specific individual statements contained in the publication."[5]

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[4] Petition for Writ of Certiorari at (i).

[5] *Id.*

This question similarly does not challenge the basis on which the action was dismissed against this respondent.

"Actual malice" is a term of art meaning knowing falsity or reckless disregard for the truth.[6] Reckless disregard is measured not by whether a reasonable publisher would have published the material, but whether the publisher in fact "entertained serious doubts" as to the truth of the publication at the time of the publication. *See, e.g., St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

The lower courts found no triable issue of "actual malice" on the part of Atlantic Monthly as to *any* of the eleven statements alleged by Petitioner to be defamatory or as to anything else. Since it is conceded that a finding of "actual malice" is required for a judgment against each Respondent, the trial court's dismissal of the action against Atlantic Monthly must be affirmed whether or not this Court agrees with the Petitioner that two of the eleven statements are actionable or that the effect of the article as a whole is separately defamatory.

Nor can this Court's forthcoming ruling in *Liberty Lobby v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1983),

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[6] Under *New York Times v. Sullivan*, 376 U.S. 254 (1964), a public official (Mr. Herbert was an Army officer) or public figure (Mr. Herbert wrote a book and appeared publicly) cannot successfully sue a publication for defamation concerning a public issue (war crimes and a cover-up) unless he shows that the allegedly defamatory material was published with "actual malice." *See also Philadelphia Newspapers, Inc. v. Hepps*, ___U.S. ___, ___, 54 U.S.L.W. 4373, 4374 (1986); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 104 S. Ct. 1949, 1965 and n.30 (1984); *Gertz v. Robert Welch*, 418 U.S. 323, 342 (1974).

cert. granted, ___U.S. ___, 105 S. Ct. 2672 (1985) (No. 84-1602), affect Atlantic Monthly's dismissal in this case. The question under review in *Liberty Lobby* is whether a public figure suing for libel must show with "convincing clarity" that actual malice exists in order to withstand a motion for summary judgment. Because the lower courts found "*no* proof" and "*no* indication" of actual malice on the part of Atlantic Monthly,[7] the standard of proof is irrelevant. Nothing in Petitioner's discussion of *Liberty Lobby* raises issues that are in any way germane to whether the Atlantic Monthly can be required to incur the cost of a jury trial in the absence of any evidence of "actual malice" on its part.[8]

As this Court has repeatedly observed, the First Amendment manifests an important public policy in favor of freedom of the press. It is intended to foster and to protect robust public debate, and this interest is particularly important with respect to public officials and public figures, as is the case here. This

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[7] 596 F. Supp. at 1231, App. 132a (emphasis added); 781 F.2d at 308, App. 15a (emphasis added). The court of appeals, after an independent review of the record, properly rejected Mr. Herbert's efforts to infer actual malice on the basis of the failure of Atlantic Monthly to independently investigate Mr. Lando's article or on the basis of information supplied by Mr. Herbert's literary agent after publication of Mr. Lando's article. *See, e.g.*, 781 F.2d at 308-09 (App. 15a-16a), *citing St. Amant v. Thompson, supra; Rosenbloom v. Metromedia*, 403 U.S. 29, 55 (1971) (and other authorities). As the Court of Appeals indicated, many of the actions of Atlantic Monthly of which Mr. Herbert complained below were "indications of responsible editorial behavior, not actual malice." 781 F.2d at 308 (App. 6a). In any event, the petition does not ask this Court to review these rulings.

[8] Petition for Writ of Certiorari at 22-25.

unfortunate litigation has now dragged on for some twelve years. During this time, Petitioner has presented no evidence that Atlantic Monthly published anything about him with actual malice. This kind of costly and protracted delay in and of itself may cause many publishers to think twice before printing an article on a potentially controversial issue. It definitely imposes a burden discouraging debate, and it thus may result in exactly the kind of "self-censorship" (*see St. Amant v. Thompson, supra*, 390 U.S. at 732) and "chilling effect" (*Philadelphia Newspapers, Inc. v. Hepps, supra*, 54 U.S.L.W. at 4375) which the First Amendment was intended to prevent. *See, e.g., Pacific Gas and Electric Company v. Public Utilities Commission of California*, ___U.S. ___, 106 S. Ct. 903, 910 (1986), citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

CONCLUSION

The Petition for Writ of Certiorari must be denied with respect to Respondent Atlantic Monthly.

Respectfully submitted,

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IN THE

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OCTOBER TERM 1985

ANTHONY HERBERT,

Petitioner,

—v.—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., and ATLANTIC MONTHLY COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS CBS INC., MIKE WALLACE AND BARRY LANDO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER THE COURT OF APPEALS ERRED IN ORDERING SUMMARY JUDGMENT FOR RESPONDENTS, MEDIA DEFENDANTS, WHERE TWO STATEMENTS IN A NEWS PROGRAM AND MAGAZINE ARTICLE ABOUT A PUBLIC FIGURE WHICH THE DISTRICT COURT HELD ACTIONABLE HAVE THE SAME DEFAMATORY STING AS OTHER STATEMENTS WHICH BOTH LOWER COURTS HELD ARE NOT ACTIONABLE.

II.

WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER'S ALLEGED "OVERALL IMPORTS" ARE NOT ACTIONABLE WHERE SUCH "OVERALL IMPORTS" ARE IDENTICAL IN MEANING TO OTHER SPECIFIC STATEMENTS WHICH ARE NOT ACTIONABLE.

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

Excluding its wholly-owned subsidiaries, the following companies were subsidiaries or affiliates of Respondent CBS Inc. (sued herein as "Columbia Broadcasting, Inc.") as of December 31, 1985: April Music Publishing Company (Proprietary) Limited; Rainbow Programming Services Company II [Limited Partnership]; Entertainment Distributors Company Pty. Limited; Music Publishing Co. of Australia Pty. Limited; CBS Catalogue Partnership [Limited Partnership]; N.S. Beaujolais Music, Inc.; N.S. Justinian Music, Inc.; Golden Apple Music, Inc.; CBS Affiliated Catalog Inc.; CBS Feist Catalog Inc.; CBS Hastings Catalog Inc.; CBS Miller Catalog Inc.; CBS Robbins Catalog Inc.; CBS U Catalog Inc.; CBS Unart Catalog Inc.; CBS Variety Catalog Inc.; CBS Catalogue Partnership Holland B.V.; CBS Partnership Musikverlag GmbH; United Artists Music (Australia) Pty. Limited; United Partnership Limited; CBS Phoenix Musikverlag GmbH; Editions CBS Catalogue Partnership S.A.; Edizioni Musicali United Artists (Italy) S.r.1.; Resolute Casa Editrice Musicali S.r.1.; United Artists Music Japan Inc.; United Artists Musikforlag AB; United Artists Music (South Africa) Pty. Limited; Grammofonselskabs Distributions Centralen A/S; CBS Epic (Thailand) Limited; CBS Music (Thailand) Limited; CBS/FOX Company, The [General Partnership]; CBS/FOX VIDEO (Holdings) Ltd.; CBS/FOX VIDEO Limited; CBS/FOX VIDEO (Germany) G.m.b.H.; CBS/FOX VIDEO (South Pacific) Pty. Ltd.; CBS/FOX VIDEO (Canada) Ltd.; CBS/FOX VIDEO (Espanola) S.A.; CBS/FOX VIDEO French Film Licensing Corp.; CBS/FOX VIDEO (France) S.A.; CBS/FOX VIDEO International S.A.R.L.; CBS/FOX VIDEO (New Zealand) Limited; CBS/FOX VIDEO (Far East) K.K.; CBS Gramophone Records and Tapes (India) Limited; CBS Disques S.A.; Editions CBS Songs S.A.R.L.; CBS/MTM Company [General Partnership]; CBS Nigeria Limited; CBS Records (Kenya) Limited; PEC Musiikkitukku OY; Music Service Center Ge-

sellschaft m.b.H; CBS/SONY Group Inc.; SD Kansai Inc.; CBS/SONY Inc.; CBS/SONY Family Club, Inc.; CBS/SONY Records Inc.; April Music Inc. (Japan); CBS/SONY California, Inc.; EPIC/SONY, Inc.; CBS/SONY Hong Kong Limited; CBS/Sony Publishing Inc.; Japan Record Distribution System, Inc.; Music Plaza, Inc.; SD Hokkaido Inc.; Shorewood Packaging Company Limited; CBS Songs Music Publishing Co. Ltd.; The Rainbow Service Company [General Partnership]; Gramophone Record Company (Proprietary) Limited; Igaku-Shoin/Saunders Ltd.; Shorewood Packaging Corp. of Canada Limited; Trintex [General Partnership]; Mainstream Communications Corp.; Maindata, Inc.; SportsChannel Chicago Associates [General Partnership]; Cablevision Programming New England Corporation; SportsChannel Associates [General Partnership]; SportsChannel Prism Associates [General Partnership]; Winterland Concessions Company; and Winterland Productions, Ltd.

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IN THE

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OCTOBER TERM, 1985

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ANTHONY HERBERT,

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—v.—

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS CBS INC., MIKE WALLACE AND BARRY LANDO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner, a public figure libel plaintiff, seeks a Writ of Certiorari to review an Order of the United States Court of Appeals for the Second Circuit reversing the District Court's ruling that two subsidiary statements in a television broadcast and magazine article are actionable, affirming the District Court's ruling that Petitioner failed to state a separate cause of action for alleged "overall defamatory imports" and ordering dismissal of Petitioner's complaint.

The Court of Appeals found that Respondents had "ample support" for their view, repeated throughout the broadcast

and article "that Herbert lied about reporting war crimes to his superiors in Vietnam and therefore must have been relieved of command for other reasons." App. A at 14a. Because the two subsidiary statements and the "overall defamatory imports" which Herbert claimed were actionable had the same meaning as the non-actionable statements, the Court of Appeals dismissed the complaint. As we demonstrate below, the decision of the Court of Appeals was well grounded in logic and law.

Procedural History

Petitioner, Lieutenant Colonel Anthony Herbert, filed his complaint on January 25, 1974. Herbert claimed over $40 million in damages for a 1973 broadcast by Respondent CBS Inc. of an Emmy award winning segment of "60 Minutes" entitled "The Selling of Col. Herbert" and for an article in *The Atlantic Monthly* entitled "The Herbert Affair." Petitioner named as defendants: (1) CBS Inc., (2) CBS correspondent Mike Wallace, (3) Barry Lando, a "60 Minutes" producer and author of *The Atlantic Monthly* article, and (4) The Atlantic Monthly Company.

After years of extensive discovery,[1] Respondents moved for summary judgment. In his opposition to that motion Petitioner identified the eleven statements which he claimed were false, defamatory and published with actual malice. On October 10, 1984 the District Court granted Respondents' motion as to nine of the eleven statements and denied Respondents' motion as to the remaining two statements. The District Court also granted summary judgment dismissing the action against

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1 Discovery in this case has been truly massive. Nearly 3000 pages of transcript were generated in the first year of discovery by the Lando deposition alone. *See Herbert v. Lando*, 441 U.S. 158, 205 n.3 (dissenting opinion of Marshall, J.). Respondents had also produced to Petitioner all of their notes of interviews with more than 120 people, all their research files, videotapes and transcripts of all filmed interviews, and scores of other documents. After this Court's 1979 decision, Respondents answered questions about their "editorial processes," investigation and research.

The Atlantic Monthly. Herbert v. Lando, 596 F. Supp. 1178 (S.D.N.Y. 1984) (Haight, J.).

Petitioner made a motion for reargument, advancing for the first time four additional statements he claimed were published with actual malice and several "overall imports" allegedly derived from the telecast and article "as a whole." Respondents thereafter moved to dismiss the entire action on the ground that the two statements remaining for trial were not actionable because, as a matter of law, given the non-actionable statements, they could not have harmed Petitioner's reputation. The District Court denied Petitioner's motion for reargument, *Herbert v. Lando*, 603 F. Supp. 983 (S.D.N.Y. 1984), and Respondents' motion to dismiss,[2] and certified all rulings for immediate appeal pursuant to 28 U.S.C. § 1292(b).

The United States Court of Appeals for the Second Circuit unanimously affirmed: (1) the ruling that nine of Petitioner's eleven proffered statements were not actionable; (2) the order dismissing *The Atlantic Monthly*; and (3) the order denying Petitioner's motion for reargument which attempted to raise Petitioner's four additional alleged defamatory statements and the alleged "overall imports." The Court of Appeals unanimously reversed the District Court's ruling that the two remaining statements were actionable and ordered dismissal of the complaint. *Herbert v. Lando*, 781 F.2d 298 (2d Cir. 1986). Petitioner did not petition for rehearing or rehearing *en banc* in the Court of Appeals.

Statement of Facts

Petitioner, Lieutenant Colonel Anthony Herbert, sought and received widespread media attention following a tour of duty in Vietnam in 1968-69. Herbert, a battalion commander in Vietnam, accused his superiors of having relieved him of

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2 The District Court's unpublished April 4, 1985 Opinion and Order denying Respondents' Motion to Dismiss is annexed hereto as an Appendix ("App.").

command because he reported war crimes to them. Petitioner made these charges on television talk shows and through other media channels, and described them in his book entitled "Soldier." The February 4, 1973 "60 Minutes" broadcast reported Herbert's claims and the results of an investigation of those claims. Three months later *The Atlantic Monthly* published an article written by Barry Lando entitled "The Herbert Affair" which again described Herbert's claims and what the investigation of those claims showed, and countered Herbert's post-broadcast attacks against the "60 Minutes" segment.

The investigation which culminated in the broadcast and article lasted over a year and involved more than 120 witnesses and thousands of pages of documents. Lando and Wallace interviewed scores of persons who knew Herbert, many of whom Herbert himself had recommended as sources who supposedly would corroborate his assertions. Lando spoke to Herbert on at least twenty-five occasions and six in-person interviews of Herbert were conducted. By the time the investigation was complete, Respondents had gathered massive and incontrovertible evidence which undermined Herbert's claims that he had reported war crimes to his superiors and had been relieved of his command because they were intent on covering up those reports.

Herbert's most serious charge was that on February 14, 1969 he reported a massacre of detainees at Cu Loi (the "Cu Loi Killings") to his superior, Colonel J. Ross Franklin. Franklin denied that claim, and Lando's investigation showed that Herbert could not have reported to Franklin because Franklin was in Hawaii on that day. Moreover, the persons and records Petitioner said would corroborate his claim did not do so.

Men who had known Herbert in Vietnam contradicted his claim that he had been relieved for reporting war crimes. The transcript of the Army's investigation into Herbert's relief provided documentary proof that Herbert had not been relieved for reporting war crimes. At no time did Herbert or any of the other thirty-eight witnesses who testified at the investiga-

tion mention that war crimes had anything to do with Herbert's relief from command. Indeed, Herbert's own testimony supported the conclusion of the inquiry: Herbert could not get along with other members of the brigade staff. In fact, it was not until seventeen months after his relief that Herbert finally prepared and submitted a written war crimes report. At that time, extensive publicity surrounded the My Lai trials at Fort McPherson, Georgia, where Herbert was then stationed.

Although Herbert claims the Army's investigations[3] were a "whitewash," Lando spoke to three Army officers recommended by Herbert: none could corroborate Herbert's story. In fact, of the three, the one officer who had first hand knowledge of the investigations said that they were comprehensive and that he was convinced Herbert had not reported war crimes to his superiors.

Herbert also denied any involvement in brutality or mistreatment of the Vietnamese. Several men whom Lando interviewed, however, described incidents where Herbert had either participated in or condoned acts of brutality.

As both Petitioner (*see, e.g.*, Petition at 4) and the Court of Appeals (App. A at 14a) recognized, the alleged defamatory effect of the broadcast and the article was to question the honesty of Petitioner's claims that he had been relieved because he had reported war crimes to his superiors in Vietnam. Among the statements in the article and broadcast which either are not now challenged by plaintiff, or which have been found by both courts below to be non-actionable are:

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3 There were four investigations which the Army initated at Herbert's instance: (1) an investigation pursuant to Article 138 of the Uniform Code of Military Justice; (2) a Criminal Investigation Division investigation into Herbert's allegation that he had reported war crimes to Franklin who failed to act; (3) an investigation into Herbert's court-martial charges against Franklin for failure to report and investigate war crimes reported to him by Herbert and (4) an investigation into Herbert's court-martial charges against Barnes for failure to report and investigate war crimes charges reported to him by Herbert. All of these charges were rejected. *See* App. A at 3a-4a; App. B at 39a-40a.

—We "spoke with more than a hundred and twenty people . . . . One after another refuted many of Herbert's claims." Article p. 76.

—"Herbert claims there are several people who had seen Franklin in Vietnam on February 14 . . . . Not one of those people . . . could back Herbert's claim." *Id.* at 78.

—"Hill denied telling Herbert he was certain he had seen Franklin returning to Vietnam on February 14 . . . . Hill also vehemently denied telling Herbert he couldn't talk because he was worried about his career." *Id.*

—"After talking with scores of men who had known Herbert in Vietnam . . . we could not find a single person who believed that Herbert had been relieved for trying to get war crimes investigated." *Id.*

—"I thought it inconceivable that Herbert was telling the truth." *Id.* at 79.

—"We checked some tales in *Soldier* about Herbert's exploits prior to Vietnam. One after another, the stories he told were refuted. . . ." *Id.* at 80.

—Herbert claimed he had documents which "demonstrated that the Army had been out to ruin him . . . . In fact, the documents say nothing of the kind." *Id.* at 81.

—Bill Hill's opinion that "Herbert has gone off the deep end on a bunch of this . . . for some reason he's become a liar, it's all so much garbage." *Id.* at 78.

—Ken Rosenblum's statement that "when it came to the critical facts, the people he had told us would support his claims just did not. You know, I think he has reached the point where he really believes his charges." *Id.* at 79.

—Grimshaw "denied that the incident [in *Soldier*] had ever occurred." He wrote, "I would do what I could to help him—anything, except lie." *Id.* at 80.

—Otto Skorzeny's statement that "everything is invented from A-Z." *Id.*

—S.L.A. Marshall's conclusion that "[a]s for where truth lies in this incident" if Herbert's recollection of Vietnam is no better than that of Korea, "the grading should be zero minus . . . . I say that he dilates expansively on things that never happened." *Id.*

—Herbert's superior, Colonel Franklin, was in Hawaii on the Valentine's Day that Herbert claimed he reported war crimes to Franklin in Vietnam. Program Transcript at 5-6.

—The vehement denials of Barnes and Franklin that Herbert had ever reported war crimes to them. *Id.* at 4.

—Herbert had made up "totally fictional charges" that were "a hoax on the American people." *Id.* at 5.

—Herbert had "no documents to show, not a piece of paper to show" that he "ever reported a war crime to anybody" prior to being relieved. *Id.* at 7.

—The denials of Douglass and Rector of Herbert's claims that Herbert had mentioned war crimes to them as a reason for relief. *Id.* at 8-9.

—Evidence from comprehensive and far-reaching investigations by the Army and others that refuted Herbert's charges. *Id.* at 9-10.

—Denunciations of the fabricated stories which appear in Herbert's book, *Soldier. Id.* at 6, 8, 13-16.

The only statement from the article which the District Court ruled to be actionable is the statement that Sergeant Major Bittorie, an Army officer who served with Petitioner in Vietnam, "had no sons." The statement appears in the following context:

> Herbert had also claimed that one of the brigade's top enlisted men, Sergeant Major John Bittorie, had been listening in an outside office when Herbert reported to

> Colonel Franklin an incident of water torture. When the Army CID questioned him, Bittorie denied Herbert's claim. Herbert told me the reason was that although Bittorie himself was retired he still had two sons in the service and had to worry about their careers. But when I flew to Columbus, Georgia to interview Bittorie, he again denied having overheard any such report. What about his sons who are in the Army? I asked. *He had no sons.*

App. B at 90a (emphasis added).

The only statement in the broadcast ruled actionable was:

> We have spoken with many men who saw Herbert after his relief in Vietnam *ye to a man they say Herbert never once said to them that he had been relieved because he had tried to push war crimes charges.*

App. B at 101a (emphasis added). With respect to that statement, the District Court accepted Petitioner's argument that it was defamatory in that it implied that Petitioner was dishonest in his claim that he reported war crimes to his superiors prior to being relieved. App. B at 102a.

In reversing the District Court's partial denial of summary judgment, the Court of Appeals found that both statements' imputation of dishonesty (lying about whether Petitioner reported war crimes to his superiors prior to being relieved) was the *same* imputation of dishonesty repeatedly (and much more directly and emphatically) made throughout the broadcast and article in passages either not challenged or ruled non-actionable. Because the Court of Appeals held that the two remaining statements added nothing to the portions of the broadcast and article held to be non-actionable, it did not reach the issue of whether Petitioner had submitted sufficient evidence of falsity and actual malice to defeat a motion for summary judgment as to those two claims.

In sum, Respondents' lengthy investigation discredited Herbert's claims that he had reported war crimes to his superiors and had been relieved of command for that reason.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

Petitioner has offered no persuasive reason for this Court to review this protracted litigation for a second time. The unanimous Court of Appeals decision is fully consistent with this Court's prior decisions and represents a reasoned, conscientious application of the First Amendment actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny. Twelve years of litigation have established that the alleged inaccuracies in the two remaining statements at issue are unimportant and subsumed entirely in broader, non-actionable statements disputing Herbert's claims about the reasons for his relief. Moreover, application of the incremental harm branch of the libel proof doctrine and the doctrine of substantial truth also produce the same result as that reached by the Court of Appeals. As a matter of law, Petitioner has no action for defamation on these facts. The ruling of the Court of Appeals does not conflict with decisions of other circuits or of this Court, raises no important issues of federal law, and should not be reviewed by this Court.

Petitioner's six alleged "overall imports," raised for the first time on his motion for reargument in the District Court, are not actionable as a matter of law. The Court of Appeals correctly ruled that because each "overall import" is identical in meaning to one or more of Petitioner's non-actionable "specific" statements, the "overall imports" cannot be an independent basis for a libel action. That ruling raises no constitutional or other important issues, does not conflict with any decisions of other circuits or of this Court, and does not entitle Petitioner to the Writ.

Petitioner specifically urged the District Court to apply the clear and convincing evidence standard in ruling on Respondents' summary judgment motion. This Court should not

grant review to entertain Petitioner's belated challenge to the very analysis he endorsed below.

The Petition amounts to an argument that a jury issue is created by any post-publication affidavit asserting that prior to publication the defendant was told something inconsistent with the broadcast or article even though the alleged inaccuracy adds nothing to the meaning or effect of the challenged publication. No case in this Court or elsewhere supports such an argument.

I.

THE NARROW, FACT-SPECIFIC HOLDING BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT AND PRESENTS NO ISSUE OF IMPORTANCE WARRANTING THIS COURT'S REVIEW

In his Petition, Herbert vehemently attacks the primary holding of the Court of Appeals that his case fails under the actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny. Petitioner's rhetoric notwithsta ding, the Second Circuit's unanimous[4] opinion is fully supported by three related defamation law defenses: (1) the *New York Times* actual malice privilege; (2) the incremental harm branch of the "libel-proof" defense; and (3) the defense of substantial truth.[5] Each of these defenses is an independent ground supporting the result below.

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4 Petitioner's 21 references in his Petition to "Judge Kaufman" cannot change the fact that the opinion of the Second Circuit's three-judge panel was unanimous. Petitioner did not petition for a rehearing *en banc* in the Court of Appeals.

5 Petitioner's attack on the Court of Appeals decision is limited to its dismissal of the two statements ruled actionable by the District Court and to both courts' refusal to permit suit on his "overall imports." Petitioner's only challenge to the rulings that nine of his proffered statements are not actionable is based on the District Court's application of the standard of convincing clarity, a result he himself advocated. *See* Discussion Point III, *infra*.

A. The Unanimous Holding of the Court of Appeals, that Minor Alleged Factual Inaccuracies Implying the Same View as Broader Non-Actionable Statements Does Not Entitle Petitioner to a Jury Trial, is Sound and Should Not Be Reviewed by This Court

The Second Circuit's opinion represents a reasoned application of the *New York Times* actual malice standard to the particular facts of this case. The opinion recognizes that the only possibly defamatory meaning of the two remaining statements is that Herbert lied about having been relieved for reporting war crimes.[6] Because the District Court and the Court of Appeals ruled that those primary, broader statements are not actionable, then in logic and in law the two remaining related statements that say precisely the same thing cannot as a matter of law support a jury finding of actual malice.[7] *See Mr.*

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6 In the statement of facts of its earlier opinion in this case, this Court recognized that Herbert's basic claim is that the article and broadcast "portrayed him as a liar and a person who had made war-crimes charges to explain his relief from command." *Herbert v. Lando*, 441 U.S. at 156. Petitioner concedes that the "program *in toto* may be fairly characterized as a defamatory attack upon petitioner's honesty and integrity" and that the thrust of the article was "similar." Petition at 4.

7 Respondents had considerable support for the two remaining statements. For example, Respondents interviewed many men who denied that Herbert had told them he had been relieved for reporting war crimes. Moreover, Respondents knew that not one of thirty-nine witnesses (including Herbert) who testified at the Article 138 hearing into Herbert's relief said that it had anything to do with war crimes. The fact that one individual (Kahila) has a different recollection of an interview cannot raise a jury issue of actual malice. *Long v. Arcell*, 618 F.2d 1145, 1148 (5th Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981). This is especially so here, where Lando's notes indicate that Kahila's recollection of the event in question has been far from consistent. *See* App. B at 103a-105a. *See also* p. 20 *infra*. Similarly, Respondent Lando's note of his interview with Bittorie indicates that he believed Bittorie had "no sons, one daughter." Lando knew that Bittorie (and abundant other evidence) supported the conclusion that Herbert had not reported war crimes while in Vietnam. Further, Petitioner's reliance now on Bittorie's denial alone to show actual malice is totally disingenuous because Petitioner told Lando that Bittorie was *not* to be believed.

Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 231 (2d Cir. 1985); *Marcone v. Penthouse*, 754 F.2d 1072, 1084 (3d Cir.), *cert. denied*, ____ U.S. ____, 106 S. Ct. 182 (1985); *Cervantes v. Time, Inc.*, 464 F.2d 986, 995 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). *See also Bartimo v. Horsemen's Benev. and Protective Ass'n*, 771 F.2d 894, 898 (5th Cir. 1985), *cert. denied*, ____ U.S. ____, 54 U.S.L.W. 3691 (1986).

The Court of Appeals holding does not conflict in any way with prior decisions of this Court. Moreover, a summary judgment order in a case where exhaustive discovery was conducted and completed raises no issues of importance which merit this Court's further review. Petitioner, after being allowed the broadest possible discovery, has been unable to identify *any* false statement which bears a distinct defamatory meaning that was published with actual malice. *See Schultz v. Newsweek*, 668 F.2d 911, 918 (6th Cir. 1982).

The unanimous Court of Appeals decision specifically notes that its "holding is thus limited to those cases in which statements allegedly made with knowing falsity or reckless disregard give rise to defamatory inferences that are only supportive of inferences that are not actionable."[8] Contrary to Petitioner's assertion (Petition at 16 & 16 n.12), District Judges are quite accustomed to determining the reasonable meaning or meanings a given statement is capable of bearing. *See Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 14 (1970); *Hallmark Builders v. Gaylord Broadcasting*, 733 F.2d 1461, 1464 (11th Cir. 1984); *Church of Scientology of California v. Cazarez*, 638 F.2d 1272, 1286 (5th Cir. 1981); *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 60 (2d Cir.

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8 Petitioner's hypothetical example allegedly demonstrating the unsound analysis below is that of a specific, false statement of fact supporting an opinion that a judge is a racist. Petition at 17. That analogy is totally inapt. Under the circumstances described, the purported opinion itself would be actionable because it is based on false facts allegedly supporting it. *See generally Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, U.S. 105 S. Ct. 2662 (1985); Restatement (Second) of Torts § 566 (1977).

1980); *Davis v. Costa-Gavras*, 619 F. Supp. 1372, 1375 (S.D. N.Y. 1985). The Court of Appeals holding requires nothing more. Where, as here, those meanings are not actionable, the action must be dismissed.

The Court of Appeals held that the thrust of the publications and the meaning of all the alleged libels were "that Herbert had not reported war crimes to his superiors in Vietnam, and therefore must have been relieved for other reasons." App. A at 21a. The Court of Appeals held that Respondents had "ample grounds to support [those] conclusions," and that the two statements cited by Petitioner have the same meaning. *Id.* The possibility that Respondents may have misstated two minor, related facts does not justify this Court's review or a jury evaluation of Respondents' states of mind. *See Time, Inc. v. Pape*, 401 U.S. 279, 292 (1971); *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 510 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978); *Ryan v. Brooks*, 634 F.2d 726, 731 (4th Cir. 1980); *Trapp v. Southeastern Newspapers*, 10 Media L. Rptr. 1985, 1991 (S.D. Ga. 1984).

On this record, Petitioner cannot prove that the two alleged minor inaccuracies were published with the requisite "intent to inflict harm through falsehood." *Henry v. Collins*, 380 U.S. 356, 357 (1965). Even if there were some minor factual inaccuracies, they "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' " *New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964) (citations omitted). In the context of this discussion about a matter of the highest public concern, the First Amendment requires the protection of minor inaccuracies which can occur in any journalistic endeavor "in order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

B. Application of the Incremental Harm Branch of the Libel-Proof Doctrine Produces the Same Result as the Court of Appeals Decision

After twelve years of litigation involving exhaustive and painstaking discovery, Petitioner's libel trial here would have been limited by the District Court to one insignificant statement in a twenty minute television broadcast and one insignificant statement in a nine page magazine article. Recognizing the incongruity of such a result, the Court of Appeals discussed the "incremental harm branch of the libel-proof plaintiff doctrine" and even recognized that "[s]ome may view our holding today as a variation of the 'libel-proof' doctrine but we need not so characterize it." App. A at 21a n.10.

The incremental harm branch of the libel-proof doctrine, grounded in the First Amendment, *Wynberg v. National Inquirer, Inc.*, 564 F. Supp. 924, 928 (C.D. Cal. 1982), has found acceptance in many lower courts.[9] The libel-proof defense "protects disseminators of news and views on public issues against burdensome litigation commenced by plaintiffs having no likelihood of significant recovery." *Sharon v. Time, Inc.*, 575 F. Supp. 1162, 1168 (S.D.N.Y. 1983). In *Simmons Ford v. Consumers Union of the United States*, 516 F. Supp. 742 (S.D.N.Y. 1981) (Weinfeld, J.), for example, the plaintiffs challenged only one of several statements in an article describing the faults of plaintiffs' electric car. The court concluded that "the portion of the article challenged by plaintiffs, could not harm their reputations in any way beyond the harm already caused by the remainder of the article" and granted the defendants' motion for summary judgment. *Id.* at 750.

While several courts have recognized the doctrine but declined to dismiss actions on that basis, *e.g.*, *Sharon v. Time,*

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9 The doctrine was first applied in cases involving plaintiffs whose reputations were so bad they had nothing left to lose. *E.g.*, *Cardillo v. Doubleday & Co.*, 518 F.2d 638, 640 (2d Cir. 1975) (prior criminal conviction); *Ray v. Time, Inc.*, 452 F. Supp. 618, 622 (W.D. Tenn. 1976), *aff'd w.o. opinion*, 582 F.2d 1280 (6th Cir. 1978).

Inc., 575 F. Supp. 1162, 1168 (S.D.N.Y. 1983); *Bose Corp. v. Consumers Union of United States, Inc.*, 529 F. Supp. 357, 362 (D. Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984); *Gannett Co. v. Re*, 496 A.2d 553, 558 (Del. 1985), their rationale is not applicable here. In each of those cases, the courts determined that the actionable statement had a different and more harmful meaning than the non-actionable statements. *E.g.*, *Sharon v. Time, Inc.*, *supra*, 575 F. Supp. at 1171 ("[n]o finding or statement in the report or in the article is comparable in its seriousness and potential reputational impact to the statement upon which this suit is based.").[10] As the unanimous Court of Appeals recognized, this case is very different. Here, the remaining two statements "merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery." App. A at 23a.

It is clear that the nine statements held to be non-actionable all impugned Herbert's veracity with regard to his claim of reporting war crimes. Both the District Court and the Court of Appeals reasoned that the statement in the article that Bittorie "had no sons," in context, likewise challenged Herbert's credibility. App. B at 91a; App. A at 22a. The gist or sting of this paragraph, that Bittorie denied Herbert's assertion that Bittorie overheard Herbert's report of water torture, is a much more serious challenge to Herbert's credibility. Herbert does not even challenge *that* defamatory gist; he contests only Respondents' knowledge about Bittorie's offspring.

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10 The court in *Liberty Lobby v. Anderson*, 746 F.2d 1563, 1568 n.6 (D.C. Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S. Ct. 2672 (1985), criticized the libel-proof doctrine but acknowledged that at some point repeated attribution of a particular character flaw (such as accusing someone of committing 35 burglaries when the true number is 34) would not be actionable. In this case the sole defamatory content of the two actionable statements is that Herbert is a liar—a theme which is returned to throughout the program and the article and is, as the Courts below noted, no different from the other non-actionable statements to the same effect. Petitioner's case is strikingly similar to that of the hypothetical plaintiff described in *Liberty Lobby*.

As set forth above, the article is replete with statements, some unchallenged and some ruled non-actionable, directly attacking Herbert's credibility (*see* pp. 6-7 *supra*). In the light of all these direct attacks on Herbert's credibility, the trivial "no sons" sentence could not possibly have caused incremental harm to Herbert's reputation and would not entitle him to more than nominal damages.

Similarly, as the courts below recognized, the "to a man" statement merely accuses Herbert of lying when he claimed he was relieved for reporting war crimes. App. A at 22a; Ap. B at 102a. As set forth above, the broadcast, like the article, contains abundant evidence and statements of identical import (*see* p. 7, *supra*). Viewed in context, the "to a man" statement simply could not have harmed Herbert's reputation beyond the harm caused by the non-actionable statements which accuse Herbert of lying about having been relieved for reporting war crimes.[11]

The decisions in *Bose*, *Cardillo* and *Simmons Ford*, *supra*, all indicate that the potential for a *de minimis* or nominal recovery does not justify forcing Respondents to trial. *See Jackson v. Longcope*, 394 Mass. 577, 476 N.E.2d 617, 619-20 (1985). *Cf. Sharon v. Time, Inc.*, 599 F. Supp. 538, 586 (S.D. N.Y. 1984) (plaintiff entitled to jury trial where only paragraph challenged is different in meaning and more defamatory than any other statement in the article). Under the incremental harm branch of the libel-proof doctrine, therefore, the "to a man" statement and the statement that Bittorie "had no sons" are not actionable as a matter of law.

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11 The District Court held the libel-proof doctrine inapplicable here because, *inter alia*, Herbert challenged many of the statements held to be non-actionable. *See* App. at 3a. The key to application of the doctrine is whether the purportedly actionable statement has the same meaning, or a less harmful meaning, than the non-actionable statements, not whether the non-actionable statements had been challenged at some point in the litigation. Otherwise, every plaintiff could challenge every statement in an article or broadcast and easily escape the doctrine.

C. Application of the Substantial Truth Doctrine Produces the Same Result as the Court of Appeals Decision

Truth is always an absolute defense to a libel action. *See Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 490 (1974); *Garrison v. Louisiana*, 379 U.S. 64 (1964). Although Petitioner is correct in his repeated statements that the First Amendment does not protect distinct false statements of fact published with actual malice, he cannot dispute that, as a public figure libel plaintiff, he "must show the falsity of the statements at issue in order to prevail on [his] suit for defamation." *Philadelphia Newspapers, Inc. v. Hepps*, ____ U.S. ____, No. 84-1491, slip op. at 8 (April 21, 1986), *citing Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) and *Herbert v. Lando*, 441 U.S. 153, 176 (1979).[12]

To avoid summary judgment, a public figure libel plaintiff must show that there is a material and disputed issue of fact as to the falsity of the statement at issue. More than literal falsity must be shown. If the statement is substantially true, summary judgment must be granted. *Anderson v. Cramlet*, No. 85-1026, slip op. (10th Cir., April 29, 1986).

The test for substantial truth is well settled. The issue is "whether the libel as published would have a *different effect* on the mind of the reader from that which the pleaded truth would have produced." *Korkala v. W.W. Norton & Co.*, 618 F. Supp. 152, 155 (S.D.N.Y. 1985) (emphasis added). *Accord*, *Wehling v. CBS*, 721 F.2d 506, 509 (5th Cir. 1983); *Orr v. Argus-Press*, 586 F.2d 1108, 1112-13 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979); *Strada v. Connecticut News-*

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12 In *Hepps*, as in *Dun & Bradstreet v. Greenmoss Builders*, ____ U.S. ____, 105 S. Ct. 2939 (1985), this Court noted that First Amendment protection is greater where statements involve matters of public concern. Obviously the subject-matter of the broadcast and article at issue herein is at the very core of the First Amendment. *See Ollman v. Evans*, *supra*, 750 F.2d at 1002 (concurring opinion of Bork, J.). "Few other discussions of public concern could make a greater claim for First Amendment protection." *Janklow v. Newsweek*, 12 Media L. Rptr. 1961, 1964-65 (8th Cir. 1986) (*en banc*) (report on dispute between governor and Native American leader).

papers, Inc., 193 Conn. 313, 477 A.2d 1005, 1010 (1984); *Mark v. Seattle Times*, 96 Wash.2d 473, 635 P.2d 1081, 1092 (1981), *cert. denied*, 457 U.S. 1124 (1982); *Fleckenstein v. Friedman*, 266 N.Y. 19, 23, 193 N.E. 537 (1934). Put another way, a statement is not actionable "if the 'gist' or 'sting' of the statement is true." *Hamer v. Dow Jones*, 12 Med. L. Rptr. 1777, 1778 (W.D. La. 1986). *See also Gomba v. McLaughlin*, 180 Colo. 332, 504 P.2d 337, 338 (1972) (where odium of true statement would have been the same as that conveyed by literally false statement, substantial truth is established).

The only statement in the Atlantic Monthly article found actionable by the District Court is that Bittorie "had no sons." This statement (underscored below) appears in the following context:

> Herbert had also claimed that one of the brigade's top enlisted men, Sergeant Major John Bittorie, had been listening in an outside office when Herbert reported to Colonel Franklin an incident of water torture. When the Army CID questioned him, Bittorie denied Herbert's claim. Herbert told me the reason was that although Bittorie himself was retired, he still had two sons in the service and had to worry about their careers. But when I flew to Columbus, Georgia to interview Bittorie, he again denied having overheard any such report. What about his sons who are in the Army? I asked. *He had no sons.*

Under the substantial truth doctrine,[13] this statement is not actionable as a matter of law. Without question, the gist or defamatory sting of the statement is that Bittorie denies Herbert's claim that Bittorie overheard him report war crimes to Colonel Franklin. Whether or not Bittorie had a son in the Army is an innocuous, subsidiary and collateral fact that does not alter the effect of the statement on the mind of the reader. As the Tenth Circuit held in *Rinsely v. Brandt*, 700 F.2d 1304,

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13 The Court of Appeals did not reach Respondents' argument based on that doctrine.

1308 (10th Cir. 1983), "any inaccuracy in the statement is too minor to be actionable."[14]

Respondents certainly do not concede that the "no sons" statement is inaccurate in any respect. However, there is no dispute that the following statement would have been absolutely true had it been included in the article:

> Herbert had also claimed that one of the brigade's top enlisted men, Sergeant Major John Bittorie, had been listening in an outer office when Herbert reported to Colonel Franklin an incident of water torture. When the Army CID questioned him, Bittorie denied Herbert's claim. Herbert told me the reason was that although Bittorie himself was retired, he still had two sons in the service and had to worry about their careers. But when I flew to Columbus, Georgia, to interview Bittorie, *he told me that he had one son in the army but* he again denied having overheard any such report.

Under the "different effect" test for substantial truth, the "no sons" remark is not substantially false. The Court of Appeals correctly ruled it is not actionable.[15]

The only statement in the broadcast which the District Court held to be actionable was the following underscored statement which Petitioner identified in opposing Respondents' summary judgment motion:

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14 The District Court accepted that an issue of fact was raised concerning whether the statement about Bittorie's sons was false and published with actual malice based on an affidavit by Bittorie that he had told Lando that he had one son who was in the army—although neither Bittorie nor Herbert contests that Bittorie, in the same affidavit, denied hearing Herbert's alleged report of a water torture incident. App. B at 91a.

15 Petitioner's reliance on *Westmoreland v. CBS*, 596 F. Supp. 1170 (S.D.N.Y. 1984) is misplaced. There, plaintiff claimed that the defendants' editing "gave [the statement] a *different meaning* and made it seem as if an important member of General Westmoreland's intelligence staff was making an accusation he had in fact not made." *Id.* at 1175 (emphasis added). Petitioner can make no such claim here.

> Wallace's statement: "We have spoken with many men who saw Herbert after his relief in Vietnam *yet to a man they say Herbert never once said to them that he had been relieved because he had tried to push war crimes charges.*

Without conceding that the above statement is in any respect inaccurate, Respondents submit that the following uncontested statement could have been published:

> We have spoken with many men who saw Herbert after his relief in Vietnam: nine out of ten of them say Herbert never once said to them that he had been relieved because he tried to push war crimes charges. Furthermore, none of the 39 people who testified at an inquiry into Herbert's relief—including Herbert himself—said he had been relieved because he tried to push war crimes charges.

Petitioner has not challenged the fact that nine of ten people asked stated that Herbert "never once said to them that he had been relieved because he had tried to push war crimes charges." In fact, the evidence shows that Respondents had ample support for the view that no one ever said Herbert "had been relieved because he had tried to push war crimes charges."

The District Court accepted that an issue of fact was raised concerning whether the "to a man" statement in the broadcast was false and published with actual malice, App. B at 105a, based on the affidavit of a former helicopter pilot and friend of Herbert's (Kahila) in which he said that he had told Lando that "Col. Herbert said his relief was part of Army politicking resulting from his reporting the Cu Loi killings and Brigade's view that what to do about it had become a problem." However, it is clear that:

(a) Kahila (in a statement to which Lando had access) said in response to a question from Herbert's lawyer as to whether Herbert had discussed the killings on the day of his relief that "Herbert did not say much that day, he was too upset," Eldridge Reply Affidavit submitted on Defendants' Motion for Summary Judgment, exh. E, at 5;

(b) Herbert's alleged conversation with Kahila concededly took place prior to Herbert's arrival in Saigon—and Herbert testified that prior to his arrival in Saigon he had not told anyone that his relief was related to reports of war crimes. *See* Herbert Dep. at 2953-54; *see also* Herbert Dep. at 2271-72, 2471-72, 2845; Herbert's testimony in the Barnes investigation;

(c) In response to a request for evidence that the broadcast statement was false, the only persons Herbert identified in his deposition were Colonel Douglas and General Rector—Kahila was not mentioned. Herbert's Dep. at 2471-72. *See also* Plaintiff's Exh. 21 to Lando Dep. at 9. It is undisputed that Douglas, Rector and each one of the other persons contacted other than Kahila denied Herbert's claim; and

(d) Herbert does not challenge what the transcript of the Army inquiry into his relief shows: that none of the 38 people who testified at the inquiry suggested that Herbert had ever reported war crimes prior to his relief. Indeed, as noted above, at that Army hearing, which Herbert requested, Herbert himself never suggested that his relief was in any way related to any attempt to report war crimes. *See* Lando Affidavit submitted on Defendants' Motion for Summary Judgment, exh. 9.

The gist or sting of the broadcast statement is not substantially false. Consideration of the "to a man" statement in context compels the holding that it could not have had a different effect on the mind of the viewer than Petitioner's version of the truth would have had. Under the substantial truth doctrine, the statement is not actionable as a matter of law. *See Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977). This Court should not review the holding of the Court of Appeals that Respondents are entitled to summary judgment.

II.

THE COURT OF APPEALS CORRECTLY HELD PETITIONER'S "OVERALL IMPORTS" ARE NOT ACTIONABLE

In his motion for reargument in the District Court and in the Petition, Petitioner has identified the following six meanings allegedly "generated by both publications as a whole":

> (1) petitioner had failed to report war crimes while serving with the 173d Brigade; (2) petitioner had made no effort to report war crimes until after My Lai was in the news; (3) during the My Lai publicity, petitioner fabricated the war crimes reason for his relief from command to explain away other reasons for his being relieved; (4) the Army investigation was thorough and found no support for Herbert's charges; (5) petitioner was a brutal man in his treatment of POWs and in condoning brutality against the Vietnamese; (6) petitioner lied about reporting war crimes in Vietnam and his concerns about war crimes.

Petition at 7.

The District Court correctly denied Petitioner's motion for reargument, noting that Petitioner had not brought to the court's attention earlier the very issue and precedent he claimed, on reargument, the court had overlooked.[16] The

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16 The procedural history of Petitioner's vague "overall imports" demonstrates why the District Court refused to consider them. The complaint's allegations are, in the District Court's words, "general and conclusory" and bear little resemblance to the six "imports" now identified. When Petitioner responded to Respondents' summary judgment motion, he specified eleven specific statements he contended were actionable. He did not, in a 282 page brief, base a single argument on any "overall imports." Understandably displeased with the result of that motion, Petitioner claimed on reargument that he had raised that issue, referring to the topic headings of the background section of his brief. Even those vague topic headings differed significantly from the imports presented on reargument. Petitioner cannot dispute that the present formulation of his imports first appeared in his motion papers on reargument.

District Court's decision is also capable of two alternative interpretations: (1) that summary judgment was proper because Herbert failed to identify specific statements alleged to be false, defamatory and published with actual malice to support those "imports";[17] and (2) that Herbert's "overall imports" are not actionable because each one is identical in meaning to one or more of his "specific" statements which are not actionable. Each rationale fully supports the result below.

Even if Petitioner had preserved the point for review, his "overall imports" are not actionable. As the Court of Appeals held, these "imports" are identical to meanings held not to be actionable in the context of his eleven "specific" statements of fact. "To permit Herbert to rest a cause of action in this case on the publication's 'overall impact' would be a meaningless gesture, since the defamatory implications of the specific statements and the overall impact of the publications are identical." App. A at 14a-15a.

The Court of Appeals did not base its ruling on any constitutional principle but, rather, on Petitioner's failure to identify any "overall" statements which differed in meaning from his "specific" statements. A review of Petitioner's six

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17 The District Court severely criticized Petitioner for not identifying his six alleged meanings in his opposition to the motion for summary judgment. Nonetheless, the District Court discussed the nine decisions newly cited by Petitioner and found they "do not focus upon the analysis pursued in the Court's prior opinion." App. C at 136a. The District Court found Petitioner's argument "an unsuccessful effort to recast claims which discovery has demonstrated are not actionable." *Id.* After noting the strict pleading rules for defamation cases imposed by such cases as *Small v. ABC*, 10 Media L. Rptr. 2391, 2392 (N.D. Iowa 1984) (requiring "plaintiff to state in his complaint the exact words broadcast which were defamatory") and the New York rule requiring *in haec verba* pleadings (citing *Foltz v. McCormick Lines*, 189 F.2d 537, 539 (2d Cir.), *cert. denied*, 342 U.S. 871 (1951) and *Laiken v. American Bank & Trust Co.*, 34 A.D.2d 514, 308 N.Y.S.2d 111, 112 (1st Dep't 1970)), the court held that, "[a]fter comprehensive discovery, plaintiff has not shown, save for the two statements as to which summary judgment was denied, that a reasonable jury could find actual malice in respect of any statement uttered by any defendant." App. C at 148a.

"overall" statements demonstrates that the Court of Appeals was entirely correct.

(1) Petitioner had failed to report war crimes while serving with the 173d Brigade.

The meaning of this statement is identical to that of statements (a), (b), (g) and (j),[18] *i.e.*, that Herbert never reported war crimes to Barnes or Franklin. Both courts below ruled those statements were not actionable. Moreover, the gist of this "import" is identical to the unchallenged denial of Bittorie that he overheard Herbert report an incident of water torture. Accordingly, "overall" statement (1) is not actionable as a matter of law.

(2) Petitioner had made no effort to report war crimes until after My Lai was in the news.

(3) During the My Lai publicity, petitioner fabricated the war crimes reasons for his relief from command to explain away other reasons for his being relieved.

These statements are both identical in import to "specific" statements (a), (b), (c), (g) and (j), which reported, among other things, the facts that Herbert "had no documents to show . . . he ever reported a war crime prior to the time the My Lai trials were going on" and "it was only after Herbert was transferred to Ft. McPherson, that there is any solid indication he was thinking about reporting war crimes." Both courts below ruled that none of those statements is actionable.

(4) The Army investigation was thorough and found no support for Herbert's charges.

This statement is nothing more than an amalgam of "specific" statements (a), (b), (c), (d), (e) and (g), none of which is actionable, and all of which state that Herbert did not report

18 Petitioner's "specific" statements are listed in an appendix to the opinion of the Court of Appeals. App. A at 25a.

war crimes to his superiors. The gist of statement (4) is the same—Herbert did not report war crimes to his superiors. Moreover, the distinct statement that the Army investigation was "thorough" is identical to the statement, advanced by Petitioner for the first time on reargument, that reported Rosenblum's opinion that the investigation was not a "white-wash." The lower courts held that statement was untimely when offered on reargument, and Petitioner does not seek review of that ruling here.[19]

(5) Petitioner was a brutal man in his treatment of POWs and in condoning brutality against the Vietnamese.

The gist of this "import" is identical to "specific" statement (h), *i.e.*, that Herbert was present when a Viet Cong nurse was being beaten during an interrogation. The lower courts held that statement not actionable. In addition, the import has precisely the same meaning as the unchallenged statement in the broadcast of Sergeant Bruce Potter about an incident where Herbert jerked a Viet Cong detainee in and out the door of a helicopter in flight "to scare him into talking," as well as Wallace's report of a statement by a helicopter pilot named Plantz accusing Herbert of having "beaten up" a woodcutter and a Viet Cong prisoner. The courts below ruled the latter statement is not actionable.

(6) Petitioner lied about reporting war crimes, his own conduct in Vietnam and his concern about war crimes.

This statement is identical in import to "specific" statements (a), (b), (c), (d), (e), (f), (g), (h) and (i), all of which accuse Herbert of having lied about reporting war crimes and about his conduct in Vietnam. In addition, the statement in the article that Bittorie denied hearing Herbert report water torture is not challenged by Herbert and has exactly the same gist or sting as "overall import" (6).

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19 On reargument, the District Court also stated that the statement was non-actionable opinion. App. C at 149a.

The Court of Appeals correctly ruled that none of the above "imports" is actionable. The court has a duty, in the first instance, to determine the meanings words are reasonably capable of bearing. *E.g.*, *Davis v. Costa-Gavras*, 619 F. Supp. 1372, 1375 (S.D.N.Y. 1985); *Hoffman v. Washington Post Co.*, 433 F. Supp. 600, 603 (D.D.C. 1977), *aff'd mem.*, 578 F. 2d 442 (D.C. Cir. 1978). The Court of Appeals properly determined that Petitioner's "overall imports" are each identical to one or more non-actionable "specific statements."[20] This Court should not grant certiorari to reexamine that determination.

III.

THIS COURT SHOULD NOT ENTERTAIN PETITIONER'S ARGUMENT THAT THE STANDARD OF CONVINCING CLARITY SHOULD NOT HAVE BEEN APPLIED TO RESPONDENTS' SUMMARY JUDGMENT MOTION

Although he does not mention it in the "Questions Presented" section of his Petition, Petitioner contends that the Court of Appeals and the District Court erred in applying the "convincing clarity" standard to the question of actual malice in evaluating Respondents' Motion for Summary Judgment. Petitioner argues that because this Court recently granted certiorari and heard argument in *Liberty Lobby v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *cert. granted*, 105 S.Ct. 2672 (1985) (No. 84-1602), "[c]ertiorari [should] be granted and this

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20 Petitioner's reliance on *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) is totally misplaced. There, the plaintiff and the Court had identified a specific and distinct implied statement which was fabricated. Petitioner cannot make such a claim here. For the same reason, the other cases cited by Petitioner to support this argument (Petition at 20-21) are inapplicable here. As the Court of Appeals recognized, this is not a case where "a combination of individual statements which in themselves might not be defamatory might lead the reader to draw an inference that is damaging to the plaintiff." App. A at 13a.

petition be held over until such time as a decision in that case issues." Petition at 24.

According to Petitioner, he interposed "strenuous objections" to the use of the convincing clarity standard and "renewed" his objections to its use in the Court of Appeals. Petition at 22-23. To the contrary, Petitioner did not raise this issue until after the District Court had rendered its decisions. In fact, in opposing Respondents' Motion for Summary Judgment, Petitioner himself noted that he was required to show actual malice by "clear and convincing evidence." Memorandum in Opposition to Defendants' Motion for Summary Judgment at 184, citing *Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932, 940 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980). Moreover, citing *Nader v. deToledano*, 408 A.2d 31, 49 (D.C. 1979), *cert. denied*, 444 U.S. 1074 (1980), Petitioner urged the District Court to determine whether "sufficient factual disputes are presented from which a reasonable jury *could* find actual malice under the 'clear and convincing' standard at trial." Plaintiff's Memorandum at 185 (emphasis in original).

Thus, not only did Petitioner not object to the use of the convincing clarity standard in the District Court, he *specifically urged* its use. Under the circumstances, this Court should not grant review to save Petitioner's case on the basis of its forthcoming decision in *Liberty Lobby*.[21]

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21 Even if Petitioner had not urged the District Court to apply the standard he now disavows, Respondents submit that the District of Columbia Circuit panel's decision in *Liberty Lobby* is wrong. The issues in *Liberty Lobby* have been fully briefed and argued. Respondents respectfully direct the Court's attention to CBS Inc.'s Brief filed in that case. *See* Brief *Amici Curiae* of American Newspaper Publishers Association et al. in Support of Petitioners, *Anderson v. Liberty Lobby*, No. 84-1602 (July 18, 1985).

CONCLUSION

After twelve years of pretrial litigation, a trial in this case would be limited to the unimportant issues of how many sons a person had and whether all or all but one person interviewed about a specific event contradicted Petitioner's story. In the particular context of this media report on a matter of the highest public concern, Petitioner has failed entirely to offer any persuasive reason for this Court to review the decision below. The Court of Appeals decided no important issues of federal law and no novel legal questions. The Writ should be denied.

Dated: May 16, 1986

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

S.D. NEW YORK

No. 74 Civ. 434-CSH

April 4, 1985

ANTHONY HERBERT,

Plaintiff,

—v.—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

Defendants.

MEMORANDUM OPINION AND ORDER

HAIGHT, *District Judge*:

In the wake of this Court's partial grant of their motion for summary judgment,[1] defendants now move to dismiss the complaint on an alternative basis. They argue that since the Court has found nine of their eleven allegedly false and defamatory statements to be non-actionable, plaintiff cannot as a matter of law be regarded as damaged by the remaining two statements.

As to those two statements, I have concluded that a reasonable jury, properly instructed, could find that they were defamatory, false, and made with actual malice. The question is whether such findings, if made, arrived at by the jury, could in law support a verdict for any amount of damages, compensatory or punitive.

1 See 596 F.Supp. 1178 (S.D.N.Y. 1984) and memorandum opinion on reargument, February 27, 1985.

Answering that question in the affirmative, I deny the motion to dismiss the complaint.

Defendants rely on the doctrine of the "libel-proof" plaintiff. That doctrine may be asserted in two ways. The first argues that the plaintiff's reputation has been so irreparably stained by prior publications or acts that the tort of defamation, which redresses injury to reputation, has no application to a reputation that cannot be damaged. The second approach is to argue that the unchallenged or unactionable portions of the offending publication attribute to plaintiff characteristics so much more injurious than the challenged or actionable portions, that the latter cannot conceivably do any incremental, compensable damage. *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984).

Cardillo v. Doubleday & Co., Inc., 518 F.2d 638 (2d Cir. 1975), furnishes an example of the first approach. *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*, 516 F.Supp. 742 (S.D.N.Y. 1981) (Weinfeld, J.) illustrates the second. *Cardillo* held that the plaintiff, complaining of his portrayal as "taking part in various criminal enterprises," had been rendered libel-proof "by virtue of his life as a habitual criminal," 518 F.2d at 639. In *Simmons Ford* the manufacturer of an electric car sued a consumers' magazine for a scathingly unfavorable article. Plaintiff singled out, from the entire text, a false statement that the car did not conform to certain federal safety standards (in point of fact, the standards were inapplicable). Judge Weinfeld dismissed the action: "Given the abysmal performance and safety evaluations contained in the article, plaintiffs could not expect to gain more than nominal damages based on the addition to the article of misstatements relating to federal safety standards." 516 F.Supp. at 750.

The case at bar fits within the second of these "libel-proof" theories: that of incremental harm.[2] If the two statements I

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2 Defendants point to no prior condemnations of Herbert tarnishing his reputation to the point that their publications could harm him no further. *Cardillo* is therefore inapplicable. Even in cases where that

have held to be actionable are not compensable because Herbert is incrementally libel-proof, it is because of the principles applied by Judge Weinfeld in *Simmons Ford*.[3]

The plaintiff in *Simmons Ford* based its defamation suit upon only one passage, taken from the text of a lengthy article which damned plaintiff's electric car beyond hope of redemption. 516 F.Supp. at 744. Those other criticisms plaintiff did not challenge in its suit. In those circumstances, Judge Weinfeld was able to write:

> ". . . the portion of the article challenged by plaintiffs, could not harm their reputations in any way beyond the harm already caused by the remainder of the article. It may be acknowledged the reputation of the CitiCar was damaged by defendant's finding that CitiCar was 'Not Acceptable.' However, the blunt fact is that, in light of defendant's extensive and detailed testing procedures, if the article had made no reference to federal safety standards, or to the CitiCar's exemptions from them, the opinions expressed therein upon which the defendant concluded the car was 'Not Acceptable' would not give rise to any actionable claim in plaintiff's favor."
>
> *Id.* at 750.

The case at bar is different because Herbert challenges many of the assertions made about him in the program and the

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particular "libel-proof" concept arguably applies, the Second Circuit has subsequently warned that the doctrine "that our *Cardillo* case enumerated is a limited, narrow one, which we will leave confined to its basic factual context." *Buckley v. Littell*, 539 F.2d 882, 889 (2d Cir. 1976).

3 Plaintiff seeks to distinguish *Simmons Ford* on the ground that the court also concluded plaintiff could not establish actual malice; he argues that "the Court's application of the libel-proof doctrine was secondary to its primary holding." Letter of counsel dated March 28, 1985 at 3. That argument flies in the face of Judge Weinfeld's characterization of the doctrine as an "independent ground" for dismissing the complaint. 516 F.Supp. at 750.

article. In essence, the two statements I have held to be actionable accuse Herbert of being a liar.[4] There are numerous statements in the program and the article calling Herbert a liar.[5] Unlike the plaintiff in *Simmons Ford*, Herbert challenges them all.

In my view, that distinction inhibits application of the libel-proof doctrine, which is narrowly construed in any event. *Buckley v. Littell, supra.* In *Liberty Lobby, supra*, the District of Columbia Circuit rejected the doctrine with this discussion:

> "The appellees' second libel-proof theory is somewhat different. They claim that the unchallenged portions of these articles attribute to the appellants characteristics so much worse than those attributed in the challenged portions, that the latter cannot conceivably do any incremental damage. This apparently equitable theory loses most of its equity when one realizes that the *reason* the unchallenged portions are unchallenged may not be that they are true, but only that appellants were unable to assert that they were willfully false. In any event, the theory must be rejected because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety. The law, however, proceeds upon the optimistic premise that there is a little bit of good in all of us—or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse. It is shameful that Benedict Arnold was a traitor, but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with

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4 Lando's statement in the article that Sergeant Major Bittorie "had no sons" casts doubt upon the veracity of Herbert's explanation to Lando of why Bittorie refused to back up Herbert's claims. 596 F.Supp. at 1212-13. Wallace's statement on the program that "to a man they say Herbert never once said to them that he had been relieved because he had tried to push war crimes charges" casts doubt upon the veracity of Herbert's account of when he first articulated that theory. 596 F.Supp. at 1217-19.

5 Some are collected in defendants' brief on this motion at 6-8.

> impunity. So also here. Even if some of the deficiencies of philosophy or practice which the appellees' articles are lawfully permitted to attribute to the appellants (which is not necessarily to say they are true) are in fact much more derogatory than the statements under challenge, the latter cannot be said to be harmless. Even the public outcast's remaining good reputation, limited in scope though it may be, is not inconsequential. ('He was a liar and a thief, but for all that he was a good family man.')."
>
> [746 F.2d at 1568 (emphasis in original).]

The Court of Appeals added a footnote:

> "There may be validity to the proposition that at some point the erroneous attribution of incremental evidence of a character flaw of a particular type which is in any event amply established by the facts is not derogatory. If, for example, an individual is said to have been convicted of 35 burglaries, when the correct number is 34, it is not likely that the statement is actionable. That is so, however, not because the object of the remarks is 'libel-proof,' but because, since the essentially derogatory implication of the statement ('he is an habitual burglar') is correct, he has not been libeled. That issue is not presented here, both because *none* of the repulsive attributes which the appellees imputed to the appellants have been established or conceded to be true, and because the statements which we find to have been improperly taken from the jury impute attributes which, while less heinous than those for which the appellees have a good-faith defense, are nevertheless quite separate and distinct from them."
>
> *Id.* at 1568 n.6 (emphasis in original).

The first of the factors described in the *Liberty Lobby* footnote applies here: none of the instances in which Herbert is meant to have lied "have been established or conceded to be true." It cannot be said on Herbert's behalf, however, that the attribute ascribed to him by the actionable statements—that he

is a liar—are "quite separate and distinct" from other statements to the same effect. For the same reason, the observation in *Liberty Lobby* text that "[i]t is shameful that Benedict Arnold was a traitor, but he was not a shoplifter to boot" does not mirror Herbert's situation. And I am mindful of Judge Sofaer's statement, rejecting the "libel-proof" defense in *Sharon v. Time, Inc.*, 599 F.Supp. 538, 586 (S.D.N.Y. 1984), that "Time's allegations were potentially more damaging to Sharon's reputation than the Report's findings."

Nevertheless, I conclude that if a plaintiff, who denies throughout that he is a liar, proves that two statements branding him a liar were false and malicious, he may be compensated for an injury to his reputation, even though he cannot prove malice in respect of other statements calling him a liar. To hold otherwise would sanction false, defamatory statements made with actual malice if accompanied by a sufficient number of false, defamatory statements where malice cannot be proved. That is not a particularly appealing result, and I do not believe that Second Circuit authority or Judge Weinfeld's analysis in *Simmons Ford* compel me to reach it. On the contrary, I agree with the *Liberty Lobby* court: "We see nothing to be said for the rule that a conscious, malicious libel is not actionable so long as it has been preceded by earlier assertions of the same untruth." 746 F.2d at 1568. That observation was made in the context of the first of the two "libel-proof" concepts, but it seems to me of general application. And I believe that a jury may apply its common sense to a fair allocation of compensable damages. *Cf. Baden v. Koch*, 79 Civ. 4296 (CSH) (S.D.N.Y. July 24, 1984) at slip op. 153-156.

I also conclude that a plaintiff in Herbert's position is entitled to seek the partial vindication of proving two false and defamatory statements were made with actual malice, even if in the circumstances the jury limits him to nominal damages. *Sharon v. Time, Inc.*, *supra*, at 586.

Finally, upon such proof Herbert would arguably be entitled to punitive damages, which of course proceed upon an entirely different theory from compensatory damages. In *Simmons Ford* Judge Weinfeld did not have to conjure with punitive damages, since his conclusion that no jury could find malice foreclosed the issue. But it is unquestionably the law in this circuit that punitive damages will lie for malicious defamation of public figures, even where compensatory damages are nominal. *Buckley v. Littell*, *supra*, at 897; *Goldwater v. Ginzburg*, 414 F.2d 324, 340 (2d Cir. 1969). For that independent reason, I deny defendants' motion.

The motion to dismiss the complaint is denied.

It is SO ORDERED.

Dated: New York, New York
April 4, 1985

Charles S. Haight, Jr.
U.S.D.J.

Supreme Court, U.S.
FILED
MAY 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANTHONY HERBERT,
Petitioner,

v.

BARRY LANDO, MIKE WALLACE,
COLUMBIA BROADCASTING SYSTEM, INC., and
ATLANTIC MONTHLY COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

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May 22, 1986

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1685

ANTHONY HERBERT,

Petitioner,

v.

BARRY LANDO, MIKE WALLACE,
COLUMBIA BROADCASTING SYSTEM, INC., and
ATLANTIC MONTHLY COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

In this public figure libel action, petitioner Anthony Herbert seeks certiorari on two issues: first, whether so-called "subsidiary libels" made with actual malice are actionable; and second, whether a libel action may be based upon the specific defamatory meanings conveyed by a publication as a whole, as distinguished from any individual statements contained in that publication.

The Court of Appeals for the Second Circuit has answered both questions negatively. It concluded that specific defamatory falsehoods—"even those that might be found to have been made with actual malice"—should not be actionable if they are "merely subsidiary" to other

"larger," nonactionable defamations.[1] App. A at 22a-23a [2] It further disallowed petitioner's "overall impact" claim of liability. *Id.* at 12a-15a.

As the Petition demonstrates, both holdings are in error. Defamatory falsehoods made with actual malice are always actionable, regardless of the context in which they appear. Pet. at 13-15 and cases cited therein.[3] And while the Court's rulings to date are less clear regarding the viability *vel non* of petitioner's "overall impact" claim, the existing division of opinion in the lower courts over this important federal question militates in favor of granting review. Pet. at 20-21.

Respondent CBS, *et al.*'s Brief in Opposition [4] dutifully recites that the Court of Appeals decision was correct "in law and logic" and, hence, that review is unwarranted. *See, e.g.*, Resp. Br. at 2; 11. Yet, it pays scant attention to the court's actual *ratio decidendi.* As if acknowledging that there really is no cogent basis for the novel constitutional theories fashioned below, respondents' brief instead constructs an elaborate series of "independent grounds" in support of the court's judgment. Resp. Br. at 10.

Specifically, ten pages of respondents' twenty-eight page opposition are devoted to discussing three defama-

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[1] These "larger" defamations were declared "nonactionable" not because petitioner conceded their truthfulness, which he never did, or because they were non-defamatory, which they were not. Rather they were "nonactionable" in the narrow legal sense that petitioner was unable to establish the "almost impossible level" of *New York Times* malice. *Dun & Bradstreet v. Greenmoss Builders,* —— U.S. ——, 105 S. Ct. 2939, 2952 (1985) (White, J., concurring).

[2] "App. A" citations refer to the Court of Appeals decision which is reproduced in Appendix A to the petition for certiorari at 1a-27a.

[3] "Pet. at ——" citations refer to the petition for writ of certiorari.

[4] Hereafter cited as "Resp. Br. at ——."

tion law defenses—the defamatory construction, "libel-proof" plaintiff, and substantial truth doctrines—that allegedly validate the Second Circuit's decision, even though that decision rests on other grounds. Resp. Br. at 12-21. But the latter two defenses were advanced by respondents below, and soundly rejected.[5] The panel's decision rests squarely on its entirely novel and unprecedented "subsidiary libel" doctrine.[6] And as for the first allegedly "independent" defense, defamatory construction, it is simply inapposite.[7]

When not proffering post-decision rationalizations for the lower court's holding, respondents' brief frequently attempts to diminish the significance of the two defamatory falsehoods which the district court found actionable. Thus these libels are variously described as "minor factual inaccuracies" or "insignificant statements." Resp. Br. at 13; 14. The record, however, is to the contrary. Both lower courts agreed that the effect of these statements was to brand petitioner publicly as a liar. App. A at 22a; App. B at 91a; 103a.[8] It is hardly accurate to

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[5] *See* App. A at 19a-21a wherein the Court of Appeals briefly considers and rejects basing its decision on the incremental harm branch of the libel-proof doctrine stating that a "reasoned and different ground [i.e., the "subsidiary libel" doctrine]" exists for its holding. *See* also App. A at 18a wherein the appellate court, by refusing to contest the district court's findings that the "subsidiary libels" were false and conceivably made with actual malice, perforce recognized that the substantial truth doctrine was inapplicable.

[6] As we pointed out in the petition for certiorari, *no cases* from this or any other court were cited by the Second Circuit to support the creation of its "subsidiary libel" doctrine. Pet. at 16. Respondents did not contest this assertion.

[7] The Second Circuit repeatedly conceded that the statements asserted by petitioner to have been made with actual malice were defamatory. *See, e.g.*, App. A at 22a. ("The first statement . . . was defamatory . . . . The second statement . . . undermines Herbert's credibility . . . .")

[8] "App. B at ——" citations refer to Appendix B to the petition for certiorari which contains the October 10, 1984 United States District Court Opinion below.

characterize such a derogatory charge, aired over a national television network, as being a "minor" assault on one's reputation. Moreover, even if these "inaccuracies" are "minor," in the sense that much more derogatory assertions were made which could not be disproven, this is no reason to disallow petitioner from seeking partial vindication of his tarnished reputation. *See* Appendix to Resp. Br. at 6a. ("[I]f a plaintiff, who denies throughout that he is a liar, proves that two statements branding him a liar were false and malicious he may be compensated for an injury to reputation, even though he cannot prove malice in respect of other statements calling him a liar.")

An additional leitmotiv sounded from the opening page of the argument section of respondents' brief is that the "protracted" nature of this litigation should somehow operate to preclude review. Resp. Br. at 9, 14, 28. However, as this Court is well aware, a significant portion of the "twelve years of litigation" of this action was taken up by respondents' refusal to answer legitimate discovery questions about their state of mind in preparing the publications at issue. *Herbert v. Lando*, 73 F.R.D. 387 (S.D.N.Y. 1977), *rev'd*, 568 F.2d 974 (2d Cir. 1977), *rev'd and remanded*, 441 U.S. 153 (1979). Clearly then, respondents have no basis to complain that this case has been in court for too long. This is particularly true given the obvious disparity in financial resources between respondents and petitioner.

Lastly respondents attempt to conjure up two alleged procedural defects as a means to obviate the need for review. First they assert that petitioner did not preserve his "overall impact" claim for review. Resp. Br. at 22-23. Second, it is alleged that petitioner may not object to the use of the "convincing clarity" standard at the district court level since he "did not raise this issue until after the District Court had rendered its decisions." *Id.* at 26-27.

As regards the first contention, it is undisputed that the overall impact claim was raised before the district court. Moreover respondents concede, as they must, that it was fully considered by that court. Resp. Br. at 23 n.17. *See also* App. C.[9] Even if it were true that this claim was only raised before the district court on reargument, respondents cite no case to support the fundamentally incorrect proposition that a legal issue fully addressed by both the district court and the Court of Appeals has not been preserved for appeal to this Court. Nor can they. Indeed, the entire weight of legal authority is to the contrary. *See generally*, *Neely v. Eby Constr. Co.*, 386 U.S. 317, 330 (1967) and cases cited therein.

The second contention is equally specious. The Court of Appeals not only allowed petitioner to argue that the district court had erred in applying the "clear and convincing" evidence standard to the question of actual malice in evaluating respondents' motion for summary judgment, but it examined that argument in detail. *See* App. A at 8a-9a. No more is needed to raise the issue on certiorari.[10] *See, e.g., Cort v. Ash*, 422 U.S. 66, 73-74 n.6 (1975) (this Court will consider all issues presented to and considered by U.S. Court of Appeals). *Accord, U.S. v. Ortiz*, 422 U.S. 891, 898 (1975); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1969).[11]

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[9] "App. C" refers to Appendix C to the petition for certiorari containing the seventeen page published district court opinion in which petitioner's overall impact claim is thoroughly addressed.

[10] Moreover, should the Court in *Liberty Lobby v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *cert. granted*, 105 S. Ct. 2672 (1985), resolve the "clear and convincing" issue in petitioner's favor, this would be sufficient to rebut Respondent Atlantic Monthly's assertion that summary judgment was correctly granted as to it. Opp. Br. of Atlantic Monthly at 3. This is because although petitioner proffered evidence of the Atlantic's actual malice below it was evaluated under the convincing clarity evidentiary standard.

[11] Even granting that petitioner's opposition to respondent's summary judgment motion at the district court level cited the "con-

CONCLUSION

For all the foregoing reasons and those stated in the Petition, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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vincing clarity standard—it was, after all, the accepted law of the Second Circuit, *see, Yiamouyiannis v. Consumers Union*, 619 F.2d 932, 940 (2d Cir. 1980)—respondents again offer no citation to explain their curious estoppel theory. Further given that this Court will, in a matter of weeks, resolve the "clear and convincing" evidence issue in the *Liberty Lobby* case, it would not further the proper administration of justice to allow petitioner's case to lapse on what might ultimately prove to be a spurious constitutional requirement.